

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



ORIGINAL

76-7442, 7451

---

United States Court of Appeals  
FOR THE SECOND CIRCUIT

---

Docket Nos. 76-7442 and 76-7451

OSCAR ROBERTSON, et al.,  
*Plaintiffs-Appellees,*

WILTON N. CHAMBERLAIN, CLIFFORD RAY and  
CHESTER WALKER.

*Appellants,*

*against*

NATIONAL BASKETBALL ASSOCIATION, et al.,  
*Defendants-Appellees.*

---

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR DEFENDANTS-APPELLEES**

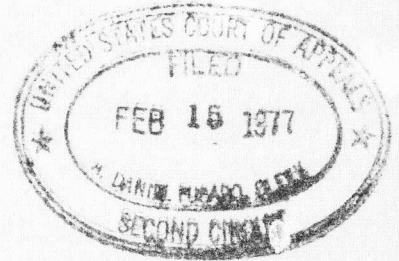
---

PROSKAUER ROSE GOETZ & MENDELSON  
*Attorneys for Defendants-Appellees*  
*Other Than Madison Square Garden*  
*Center, Inc. and Madison Square*  
*Garden Corporation*  
300 Park Avenue  
New York, New York 10022  
(212) 593-9000

*Of Counsel:*

DAVID J. STERN  
MICHAEL A. CARDOZO  
JEFFREY A. MISHKIN  
RICHARD L. WASSERMAN

---



## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	3
THE FACTS WITH RESPECT TO THE OBJECTORS.....	7
A. Clifford Ray.....	7
B. Chester Walker.....	9
C. Wilton N Chamberlain.....	12
ARGUMENT	
POINT I. THE FACTS WITH RESPECT TO EACH OF THE OBJECTORS SUPPORT THE FAIRNESS AND REASONABLENESS OF THE SETTLEMENT.....	15
POINT II. THE SETTLEMENT AGREEMENT DOES NOT PERPETUATE ILLEGAL PRACTICES.....	21
A. A <u>Per Se</u> Analysis Was Properly Rejected By The Court Below.....	24
B. The Labor Exemption Was A Critical Issue To Be Tried In This Case....	29
1. Mandatory Subjects of Collective Bargaining.....	31
2. Proof of the Issue of <u>Bona</u> <u>Fide</u> Collective Bargaining Relationship.....	33
POINT III. THE COMPROMISE BETWEEN THE NBA AND ITS PLAYERS RESULTED FROM <u>BONA FIDE</u> ARM'S-LENGTH BARGAINING FOR THE BENEFIT OF PAST, PRESENT AND FUTURE NBA PLAYERS.....	37
POINT IV. THE CLASS ACTION ISSUES ARE NOT PROPERLY RAISED ON THIS APPEAL..	41
A. Appellants Are Estopped From Challenging The Class Action Ruling.....	41

	<u>PAGE</u>
1. Chester Walker.....	42
2. Wilton N. Chamberlain.....	43
3. As a Matter of Law, Appellants Are Estopped from Challenging the Class Action Ruling.....	44
B. To Allow Appellants Relief From The Class Action Certification At This Stage Of The Proceedings Would Permit "A Return To One-Way Intervention".....	48
POINT V. THE INDIVIDUAL ISSUES RAISED BY APPELLANTS ARE WITHOUT MERIT.....	52
A. The Validity Of The Preliminary Injunction Is Not Before This Court.....	53
B. The <u>Res Judicata</u> Effect Of The Judgment Below Cannot Be Considered On This Appeal.....	55
C. The Covenant Not To Sue And The Continuing Jurisdiction Provisions In The Settlement Agreement Are Proper.....	56
D. The Injunctions Against Prosecution Of The Chamberlain And Walker Actions, Even If Reviewable Here, Were Proper.....	59
1. Chamberlain's Antitrust Claim Is Part of the Robertson Complaint.....	59
2. The Time of the Accrual of Chamberlain's Claim Is Irrelevant.....	62
3. The District Court Had Jurisdiction to Enjoin Chamberlain from Prosecuting his California Action.....	65
CONCLUSION.....	70

# TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>ACLU v. Laird</u> , 463 F.2d 499 (7th Cir. 1972), <u>cert. denied</u> , 409 U.S. 1116 (1973).....	67
<u>Ace Heating &amp; Plumbing Co. v. Crane Co.</u> , 453 F.2d 30 (3d Cir. 1971).....	42
<u>Acree v. Air Line Pilots Association</u> , 390 F.2d 199 (5th Cir.), <u>cert. denied</u> , 393 U.S. 852 (1968).....	61
<u>Air Line Stewards Local 550 v. American Airlines, Inc.</u> , 490 F.2d 636 (7th Cir. 1973), <u>cert. denied</u> , 416 U.S. 993 (1974).....	44, 46, 47
<u>Alpine Pharmacy, Inc. v. Chas. Pfizer &amp; Co.</u> , 481 F.2d 1045 (2d Cir.), <u>cert. denied</u> , 414 U.S. 1092 (1973).....	47
<u>American Can Co. v. Russellville Canning Co.</u> , 191 F.2d 38 (8th Cir. 1951).....	18, 19
<u>American Employers' Insurance Co. v. King Resources Co.</u> , 20 F.R. Serv. 2d 161 (D. Colo. 1975).....	20, 52, 55
<u>American Football League v. National Football League</u> , 27 F.R.D. 264 (D. Md. (1961).....	25
<u>American Pipe &amp; Construction Co. v. Utah</u> , 414 U.S. 538 (1974).....	50, 69
<u>In re Antibiotic Antitrust Actions</u> , 333 F. Supp. 296 (S.D.N.Y.), <u>aff'd sub nom. Connors v. Chas. Pfizer &amp; Co.</u> , 450 F.2d 1119 (2d Cir. 1971).....	55
<u>Arrowsmith v. United Press International</u> , 320 F.2d 219 (2d Cir. 1963).....	66
<u>Avis Rent A Car System, Inc. v. General Motors Corp.</u> , 21 F.R. Serv. 2d 1093 (N.D. Ill. 1976).....	67

	<u>PAGE</u>
<u>Backo v. Local 281, United Brotherhood of Carpenters,</u> 438 F.2d 176 (2d Cir. 1970), <u>cert. denied</u> , 404 U.S. 858 (1971).....	68
<u>Berman v. Thomson, 403 F. Supp. 695</u> (N.D. Ill. 1975).....	57
<u>Boggess v. Hogan, 410 F. Supp. 433</u> (N.D. Ill. 1975).....	42, 58
<u>Brennan v. Midwestern United Life</u> <u>Insurance Co., 450 F.2d 999 (7th Cir.</u> <u>1971), cert. denied, 405 U.S. 921</u> (1972).....	69
<u>Brown v. Hughes, 136 F. Supp. 55</u> (M.D. Pa. 1955).....	66
<u>Bryan v. Pittsburgh Plate Glass Co.,</u> 494 F.2d 799 (3d Cir.), <u>cert. denied</u> , 419 U.S. 900 (1974).....	46
<u>Calagaz v. Calhoon, 309 F.2d 248</u> (5th Cir. 1962).....	69
<u>Caldwell-Clements, Inc. v. McGraw-Hill</u> <u>Publishing Co., 12 F.R.D. 403 (S.D.N.Y.</u> 1952).....	64
<u>Matter of California Sports, Inc. and</u> <u>Wilton N. Chamberlain, Joint</u> <u>Appendix at 204 (1973) (Seitz, Arb.)</u> .....	12
<u>Cappadona v. New England Patriots Football</u> <u>Team, Civ. No. 72-1119-W (D. Mass. March</u> 7, 1974).....	27
<u>Central New York Basketball, Inc. v.</u> <u>Barnett, 181 N.E.2d 506 (Ohio Com. Pl. 1961)</u> .....	12
<u>Cherner v. Transatron Electronic Corp.,</u> 221 F. Supp. 48 (D. Mass. 1963).....	55, 58
<u>City of Detroit v. Grinnell Corp., 356</u> <u>F. Supp. 1380 (S.D.N.Y. 1972), aff'd,</u> 495 F.2d 448 (2d Cir. 1974).....	58
<u>City of Detroit v. Grinnell Corp., 495</u> <u>F.2d 448 (2d Cir. 1974)</u> .....	16, 17, 37, 53

	<u>PAGE</u>
<u>Clark v. Universal Builders, Inc., 501</u> <u>F.2d 324 (7th Cir.), cert. denied,</u> <u>419 U.S. 1070 (1974).....</u>	69
<u>Cleveland v. Higgins, 148 F.2d 722 (2d</u> <u>Cir.), cert. denied, 326 U.S. 722</u> <u>(1945).....</u>	63
<u>Coakley &amp; Booth, Inc. v. Baltimore</u> <u>Contractors, Inc., 367 F.2d 151</u> <u>(2d Cir. 1966).....</u>	67, 68
<u>Cotchett v. Avis Rent A Car System, Inc.,</u> <u>56 F.R.D. 549 (S.D.N.Y. 1972).....</u>	69
<u>Cresta Blanca Wine Co. v.</u> <u>Eastern Wine Corp., 143 F.2d 1012</u> <u>(2d Cir. 1944).....</u>	67
<u>Dale Electronics, Inc. v. R. C. L.</u> <u>Electronics, Inc., 53 F.R.D. 531</u> <u>(D. N.H. 1971).....</u>	68
<u>Dallas Cowboys Football Club v. Harris,</u> <u>348 S.W.2d 37 (Tex. Civ. App. 1961).....</u>	12
<u>Derdiarian v. Futterman Corp., 38</u> <u>F.R.D. 178 (S.D.N.Y. 1965).....</u>	58
<u>EEOC v. Plumbing &amp; Pipefitting,</u> <u>Local 189, 438 F.2d 408 (6th Cir.),</u> <u>cert. denied, 404 U.S. 832 (1971).....</u>	58
<u>Engelhardt v. Bell &amp; Howell Co., 327</u> <u>F.2d 30 (8th Cir. 1964).....</u>	61
<u>Environmental Defense Fund v. EPA,</u> <u>485 F.2d 780 (D.C. Cir. 1973).....</u>	67, 68
<u>Fields v. Wolfson, 41 F.R.D. 329</u> <u>(S.D.N.Y. 1967).....</u>	67
<u>Fishgold v. Sullivan Drydock &amp; Repair</u> <u>Corp., 328 U.S. 275 (1946).....</u>	63
<u>Flinn v. FMC Corp., 528 F.2d 1169</u> <u>(4th Cir. 1975), cert. denied,</u> <u>424 U.S. 967 (1976).....</u>	42, 47

	<u>PAGE</u>
<u>Flood v. Kuhn</u> , 316 F. Supp. 271 (S.D.N.Y. 1970), <u>aff'd</u> , 443 F.2d 264 (2d Cir. 1971), <u>aff'd</u> , 407 U.S. 258 (1972).....	32
<u>Flood v. Kuhn</u> , 407 U.S. 258 (1972).....	29
<u>In re Four Seasons Securities Laws</u> <u>Litigation</u> , 502 F.2d 834 (10th Cir.), <u>cert. denied</u> , 419 U.S. 1034 (1974).....	50
<u>In re Four Seasons Securities Laws</u> <u>Litigation</u> , 63 F.R.D. 422 (W.D. Okla. 1974), <u>aff'd</u> , 525 F.2d 500 (10th Cir. 1975).....	51, 52
<u>In re Four Seasons Securities Laws</u> <u>Litigation</u> , 525 F.2d 500 (10th Cir. 1975).....	46
<u>Fox v. Glickman Corp.</u> , 253 F. Supp. 1005 (S.D.N.Y. 1966).....	58
<u>Griffin v. Illinois Central R.R.</u> , 88 F. Supp. 552 (N.D. Ill. 1949).....	68
<u>Grunin v. International House of</u> <u>Pancakes</u> , 513 F.2d 114 (8th Cir.), <u>cert. denied</u> , 423 U.S. 864 (1975).....	37
<u>In re Gypsum Cases</u> , 386 F. Supp. 959 (N.D. Cal. 1974).....	57
<u>Hadden v. Rumsey Products, Inc.</u> , 196 F.2d 92 (2d Cir. 1952).....	66
<u>Hanover Shoe, Inc. v. United Shoe</u> <u>Machinery Corp.</u> , 185 F. Supp. 826 (M.D. Pa.), <u>aff'd per curiam</u> , 281 F.2d 481 (3d Cir. 1960).....	18
<u>Heasley v. United States</u> , 312 F.2d 641 (8th Cir. 1963).....	54
<u>Helene Curtis Industries, Inc. v.</u> <u>Sales Affiliates, Inc.</u> , 247 F.2d 940 (2d Cir. 1957).....	68

	<u>PAGE</u>
<u>Hoxsey v. Hoffpauir</u> , 180 F.2d 84 (5th Cir.), <u>cert. denied</u> , 339 U.S. 953 (1950).....	66
<u>In re International House of Pancakes Franchise Litigation</u> , 536 F.2d 261 (8th Cir. 1976).....	50
<u>International Ship Supply Co. v. American Tobacco Co.</u> , 1967 CCH Trade Cas. ¶72,297 (E.D. Pa. 1967).....	64
<u>Kapp v. National Football League</u> , 390 F. Supp. 73 (N.D. Cal. 1974).....	28
<u>Kelly's Trust v. Commissioner</u> , 168 F.2d 198 (2d Cir. 1948).....	53
<u>Kennedy v. Long Island R.R.</u> , 319 F.2d 366 (2d Cir. 1963).....	24
<u>Kronenberg v. Hotel Governor Clinton, Inc.</u> , 281 F. Supp. 622 (S.D.N.Y. 1967).....	67
<u>Lawlor v. National Screen Service Corp.</u> , 349 U.S. 322 (1955).....	63
<u>Lemat Corp. v. Barry</u> , 80 Cal. Rprr. 240 (1st Dist. Ct. App. 1969).....	12
<u>Levin v. National Basketball Association</u> , 385 F. Supp. 149 (S.D.N.Y. 1974).....	25
<u>Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.</u> , 381 U.S. 676 (1965).....	30
<u>Local 194, Retail, Wholesale &amp; Dep't Store Union v. Standard Brands, Inc.</u> , 540 F.2d 864 (7th Cir. 1976).....	69
<u>Mackey v. National Football League</u> , 543 F.2d 606 (8th Cir. 1976).....	27, 28, 30, 33
<u>MacLaren v. B-I-W Group, Inc.</u> , 329 F. Supp. 545 (S.D.N.Y. 1971).....	68
<u>Macris v. Sociedad Maritima San Nicolas, S.A.</u> , 271 F.2d 956 (2d Cir. 1959), <u>cert. denied</u> , 362 U.S. 935 (1960).....	63

	<u>PAGE</u>
<u>Maple Flooring Manufacturers Association v. United States,</u> 268 U.S. 563 (1925).....	24
<u>Martin Marietta Corp. v. FTC,</u> 376 F.2d 430 (7th Cir.), <u>cert. denied</u> , 389 U.S. 923 (1967).....	53
<u>In re Master Key Litigation, M.D.L.</u> Docket No. 45 (D. Conn. June 14, 1976), <u>aff'd</u> , Slip Op., Dkt. No. 76-7376 (2d Cir. Sept. 27, 1976).....	58
<u>Meeropol v. Nizer,</u> 505 F.2d 232 (2d Cir. 1974).....	67
<u>Minnesota v. United States Steel Corp.,</u> 44 F.R.D. 559 (D. Minn. 1968).....	69
<u>Molinas v. National Basketball Association,</u> 190 F. Supp. 241 (S.D.N.Y. 1961).....	28
<u>Mungin v. Florida East Coast Ry.,</u> 318 F. Supp. 720 (M.D. Fla. 1970), <u>aff'd per curiam</u> , 441 F.2d 728 (5th Cir.), <u>cert. denied</u> , 404 U.S. 897 (1971).....	46
<u>National Association of Regional Medical Programs, Inc. v. Weinberger,</u> 396 F. Supp. 842 (D. D.C. 1975).....	66, 69
<u>National Basketball Players Association,</u> Case No. 2-CB-5948, 4 AMR ¶10,037 (1976).....	32
<u>National Equipment Rental, Ltd. v. Fowler,</u> 287 F.2d 43 (2d Cir. 1961).....	67, 68
<u>Netter v. Ashland Paper Mills, Inc.,</u> 1957 CCH Trade Cas. ¶68,598 (S.D.N.Y. 1957).....	64
<u>Newman v. Stein,</u> 464 F.2d 689 (2d Cir.), <u>cert. denied</u> , 409 U.S. 1039 (1972).....	37
<u>Philadelphia Electric Co. v. Anaconda American Brass Co.,</u> 43 F.R.D. 452 (E.D. Pa. 1968).....	49

	<u>PAGE</u>
<u>Philco Corp. v. Radio Corp. of America,</u> 186 F. Supp. 155 (E.D. Pa. 1960).....	64
<u>Powell v. Pennsylvania R.R.,</u> 166 F. Supp. 448 (E.D. Pa. 1958), <u>rev'd on other grounds,</u> 267 F.2d 241 (3d Cir. 1959).....	46
<u>Regal Knitwear Co. v. NLRB,</u> 324 U.S. 9 (1945).....	68
<u>Remington Products Corp. v. American</u> <u>Aerovap, Inc.,</u> 192 F.2d 872 (2d Cir. 1951).....	67
<u>Research Corp. v. Asgrow Seed Co.,</u> 425 F.2d 1059 (7th Cir. 1970).....	51, 55
<u>Richard's Lumber &amp; Supply Co. v. United</u> <u>States Gypsum Co.,</u> 545 F.2d 18 (7th Cir. 1976).....	57
<u>Rio Hondo Harvesting Association v.</u> <u>Johnson,</u> 293 F.2d 426 (5th Cir. 1961).....	54
<u>Rivera v. Chicken Delight, Inc.,</u> 17 F.R. Serv. 2d 473 (S.D. Tex. 1973).....	63
<u>Rodriguez v. Family Publications</u> <u>Service, Inc.,</u> 57 F.R.D. 189 (C.D. Cal. 1972).....	69
<u>Ronson Art Metal Works, Inc. v.</u> <u>Brown &amp; Bigelow,</u> 105 F. Supp. 169 (S.D.N.Y.), <u>aff'd</u> <u>on opinion below,</u> 199 F.2d 760 (2d Cir. 1952).....	67
<u>Royster Drive-In Theatres, Inc. v.</u> <u>American Broadcasting-Paramount</u> <u>Theatres, Inc.,</u> 268 F.2d 246 (2d Cir. 1959).....	18
<u>Ruskay v. Jensen,</u> 342 F. Supp. 264 (S.D.N.Y. 1972).....	61
<u>Salvant v. Louisville &amp; N.R.R.,</u> 83 F. Supp. 391 (W.D. Ky. 1949).....	68
<u>Saylor v. Lindsley,</u> 456 F.2d 896 (2d Cir. 1972).....	20, 42

	<u>PAGE</u>
<u>Schwartzman v. Tenneco Manufacturing Co.</u> , 375 F.2d 123 (3d Cir. 1967).....	55
<u>Shakman v. Democratic Organization of Cook County</u> , 533 F.2d 344 (7th Cir. 1976).....	58
<u>Smith v. Alleghany Corp.</u> , 394 F.2d 381 (2d Cir.), <u>cert. denied</u> , 393 U.S. 939 (1968).....	51, 55
<u>Smith v. Pro-Football</u> , 420 F. Supp. 738 (D. D.C. 1976).....	28, 32, 35,
<u>Stella v. Kaiser</u> , 218 F.2d 64 (2d Cir. 1954), <u>cert. denied</u> , 350 U.S. 835 (1955).....	57
<u>Stewart v. Lincoln-Douglas Hotel Corp.</u> , 208 F.2d 379 (7th Cir. 1953).....	53
<u>Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.</u> , 178 F.2d 150 (2d Cir. 1949).....	18
<u>Sunbeam Corp. v. Masters, Inc.</u> , 124 F. Supp. 155 (S.D.N.Y. 1954).....	58
<u>Supermarkets General Corp. v. Grinnell Corp.</u> , 490 F.2d 1183 (2d Cir. 1974).....	48
<u>Sweeney v. Hanley</u> , 126 F. 97 (9th Cir. 1903).....	54
<u>Telephonics Corp. &amp; Fabrionics Corp. v. Lindly &amp; Co.</u> , 291 F.2d 445 (2d Cir. 1961).....	67, 68
<u>Texaco, Inc. v. Fiumara</u> , 232 F. Supp. 757 (E.D. Pa. 1964).....	56
<u>Thonen v. Jenkins</u> , 455 F.2d 977 (4th Cir. 1972).....	53
<u>Travelers Insurance Co. v. Commissioner</u> , 161 F.2d 93 (2d Cir.), <u>cert. denied</u> , 332 U.S. 766 (1947).....	63

	<u>PAGE</u>
<u>Tunstall v. Brotherhood of</u> <u>Locomotive Firemen, 148 F.2d</u> <u>403 (4th Cir. 1945)</u> .....	68
<u>UMW v. Pennington, 381 U.S.</u> <u>657 (1965)</u> .....	30
<u>United States v. American Optical</u> <u>Co., 97 F. Supp. 66 (N.D. Ill.</u> <u>1951)</u> .....	68
<u>United States v. Hall, 472 F.2d</u> <u>261 (5th Cir. 1972)</u> .....	68
<u>United States v. National Football</u> <u>League, 116 F. Supp. 319 (E.D.</u> <u>Pa. 1953)</u> .....	26, 27
<u>United States v. National Lead Co.,</u> <u>137 F. Supp. 589 (S.D.N.Y. 1956)</u> .....	58
<u>United States v. Schine, 260 F.2d</u> <u>552 (2d Cir. 1958), cert. denied,</u> <u>358 U.S. 934 (1959)</u> .....	58
<u>Urbain v. Knapp Brothers Manufacturing</u> <u>Co., 217 F.2d 810 (6th Cir. 1954),</u> <u>cert. denied, 349 U.S. 930 (1955)</u> .....	68
<u>Wainwright v. Kraftco Corp., 58 F.R.D. 9</u> <u>(N.D. Ga. 1973)</u> .....	58
<u>Walder v. Paramount Publix Corp.,</u> <u>1956 CCH Trade Cas. ¶68,572 (S.D.N.Y. 1956)</u> .....	64
<u>Wall Products Co. v. National Gypsum</u> <u>Co., 367 F. Supp. 972 (N.D. Cal. 1973)</u> .....	57
<u>Weeks v. Bareco Oil Co., 125 F.2d</u> <u>84 (7th Cir. 1941)</u> .....	67
<u>West Virginia v. Chas. Pfizer &amp; Co.,</u> <u>314 F. Supp. 710 (S.D.N.Y. 1970),</u> <u>aff'd, 440 F.2d 1079 (2d Cir.),</u> <u>cert. denied, 404 U.S. 871 (1971)</u> .....	55, 58

	<u>PAGE</u>
<u>Wickes Corp. v. Industrial Financial Corp., 493 F.2d 1173 (5th Cir. 1974).....</u>	54
<u>Willson v. Columbia Gas &amp; Electric Corp., 186 F.2d 464 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951).....</u>	61
<u>Wren v. Smith, 410 F.2d 390 (5th Cir. 1969).....</u>	63
<u>Worthen Bank &amp; Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974).....</u>	24
<u>Zahn v. International Paper Co., 414 U.S. 291 (1973).....</u>	69
<u>Zients v. LaMorte, 459 F.2d 628 (2d Cir. 1972).....</u>	58
 <u>STATUTES AND REGULATIONS:</u>	
Federal Rules of Civil Procedure:	
Rule 4(c).....	66
Rule 23(c)(2).....	43
Rule 23(c)(3).....	55, 69
Rule 65(d).....	68
28 U.S.C. §1292(a)(1).....	54
29 U.S.C. §158(d).....	30
N.Y. Civil Practice Law and Rules §§301, 302 (McKinney 1972).....	66

	<u>PAGE</u>
<u>OTHER AUTHORITIES:</u>	
Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 69, 98-107 (1966).....	49
R. Bork, "Resolved: Present Antitrust Restraints on Pricing Should be Relaxed", 41 ABA Antitrust L.J. 8 (1971).....	28
M. Jacobs & R. Winter, "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage", 81 Yale L.J. 1 (1971).....	33
1 Pt. 2 J. Moore, <u>Federal Practice</u> , "Manual for Complex Litigation", Appendix 1.45, Sample Order and Notice of Proposed Settlement (2d ed. 1975).....	49
3B J. Moore, <u>Federal Practice</u> ¶23.60 (2d ed. 1977).....	55
3B J. Moore, <u>Federal Practice</u> ¶23.92 (2d ed. 1977).....	67, 68
7 J. Moore, <u>Federal Practice</u> ¶65.07 (2d ed. 1975).....	54
<u>Restatement of Judgments</u> §61 (1942).....	61
7A C. Wright & A. Miller, <u>Federal Practice and Procedure</u> ¶1789 (1972).....	55
11 C. Wright & A. Miller, <u>Federal Practice and Procedure</u> §2947 (1973).....	54

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76-7442 and 76-7451

---

OSCAR ROBERTSON, et al.,

Plaintiffs-Appellees,

WILTON N. CHAMBERLAIN, CLIFFORD RAY and  
CHESTER WALKER,

Appellants,

-against-

NATIONAL BASKETBALL ASSOCIATION, .  
et al.,

Defendants-Appellees.

---

On Appeal From A Judgment Of The United States District  
Court For The Southern District Of New York

---

BRIEF FOR DEFENDANTS-APPELLEES

---

ISSUES PRESENTED

1. Have appellants satisfied their burden of making a clear showing that the District Court abused its discretion in finding the settlement to be fair, reasonable and adequate? (This issue is dealt with in the Brief of Plaintiffs-Appellees at pp. 13-36 and in this Brief at pp. 15-41.)

2. Can appellants overturn this settlement, which was the product of arm's-length negotiations, on the basis of a con-

tention that it contains "likely" violations of the Sherman Act where the settlement eliminates or severely modifies challenged practices which the court below had refused to hold were per se illegal? (This issue is dealt with in the Brief of Plaintiffs-Appellees at pp. 36-50 and this Brief at pp. 21-41.)

3. Can individual class members, including a named plaintiff and another class member both of whom expressly authorized the commencement of this class action, after having benefited from the pendency and settlement of this suit, challenge on this appeal the correctness of the earlier Rule 23(b)(1) class action certification? (This issue is dealt with in this Brief at pp. 41-52.)

4. Did the District Court properly certify this action as a class action pursuant to Rule 23(b)(1) and afford adequate notice and opportunity to object to the settlement so as to afford class members due process? (This issue is dealt with in the Brief of Plaintiffs-Appellees at pp. 50-70.)

5. Can the preliminary injunctions issued by the District Court enjoining prosecution by individual class members of subsequent actions attacking the legality of certain aspects of the National Basketball Association's player allocation system be challenged on this appeal from a final judgment? (This issue is dealt with in this Brief at pp. 53-54 and 59-69.)

6. Can the res judicata effect of the judgment below be determined on this appeal? (This issue is dealt with in this Brief at p. 55.)

### STATEMENT OF THE CASE

This is an appeal (JA 1393, 1428)\* by a named plaintiff and two members of the plaintiff class from a judgment (JA 1807) entered on August 4, 1976 by the United States District Court for the Southern District of New York (Carter, J.) approving the settlement agreement in this antitrust action.

The landscape of professional sports is strewn with the debris of previous decisions demonstrating that the complex issues inherent in the relationship between sports leagues and their player-employees are not susceptible to satisfactory resolution by conventional judicial means.

Against this background, the National Basketball Association ("NBA") on the one hand, and the NBA players on the other, have agreed to restructure their employment relationship in professional basketball. That restructuring is encompassed in the settlement agreement approved below, which ended six years of costly, wasteful litigation. Simultaneously, that restructuring was incorporated in a collective bargaining agreement between the NBA and its players' union, to which all class members had belonged,

\* All references herein are: to the Joint Appendix, as "JA"; to documents in the record not contained in the Joint Appendix, by the title of the document; to the opinion below approving the settlement, as "Opn. JA"; to the Joint Brief of Appellants On The Common Issues, as "J. Br."; to Appellant Chamberlain's Supplemental Brief, as "Supp. Br."; to the Brief of Plaintiffs-Appellees, as "Pl. Br."

thereby ending a period of stalemate and uncertainty at the collective bargaining table.

That litigation and uncertainty resulted from the classic meeting of an immovable object and an irresistible force. The owner-employers, vigorously defending the practices to which they attributed the growth -- indeed the very existence -- of professional basketball, were unwilling at the outset to accede to any modification in those practices. The player-employees, members of the most powerful union in professional sports, were united in their determination, purpose and strategy to eliminate, as antithetical to players' interests, every one of the practices claimed essential by the owners.

To avoid the ultimate confrontation, in which even the "winner" would necessarily lose, the parties reached an agreement, the terms of which reflect the results of difficult and hard-fought negotiations between evenly-matched adversaries:

"These terms come to grips with plaintiffs' objections enumerated in the lawsuit, while at the same time seeking to accommodate defendants' contentions that some restrictions or restraints are essential for the survival of the NBA as a viable organization able to field teams that offer truly competitive sports exhibitions."  
(Opn. JA 1680-1)

The specifics of the plaintiffs' achievements in this litigation are set forth in full in the Brief of Plaintiffs-Appellees. These accomplishments include not only the enormous gains flowing from injunctive relief achieved during the litigation and the over \$5,000,000 agreed to be paid by the NBA and its teams ("NBA defendants"), but also the prospective changes in the three central areas of dispute -- the college draft, the option clause and the compensation rule. The following assessment of these changes by the court below was not disputed by objectants either there, or in their briefs to this Court:

"The settlement effectuates a radical modification of the disputed practices in respect of the college draft and options for future services. In addition, there will be a phasing out of the reserve compensation rules, arbitration of disputes, a covenant by the class not to sue, appointment of a Special Master to supervise and enforce the settlement agreement and retention of jurisdiction by the court to assert final authority in the enforcement of the settlement terms." (Opn. JA 1680)

But for the filing of the three objections being pursued on this appeal, there was no expression of disagreement -- from among the approximately 500 class members or the commentators who have uniformly hailed the settlement agreement as a sensible solution to a seemingly insoluble problem -- with the conclusion of the court below that "[t]he proposed settlement constitutes a negotiated compromise which fairly seeks to protect the interests of both the players and the

club owners. It should make for an era of peace and stability in professional basketball for many years to come." (Opn. JA 1685)

Point I, infra, is devoted to a review of the facts of the objectors which demonstrate that their objections to the settlement are without merit, and are advanced by objectors whose motivations are either suspect or attributable to concerns wholly unrelated to the settlement or its impact on them. These circumstances, together with the factors discussed in the Brief of Plaintiffs-Appellees at pp. 20-36, confirm the fairness and reasonableness of the settlement agreement approved below.

All parties recognized the risks and uncertainties of litigation, but, as is demonstrated in Point II, infra, the strength of the defenses that defendants were prepared to prove had this case gone to trial -- that the challenged practices were reasonable and that they were, in any event, exempt from the antitrust laws by reason of the labor exemption -- further confirm that the settlement approved by the court below was fair, reasonable and adequate. Moreover, the settlement agreement, which "effectuates a radical modification of the disputed practices" (Opn. JA 1680), was unquestionably the product of bona fide arm's-length bargaining for the benefit of past, present and future players and does not perpetuate illegal practices. (Point III, infra)

As is demonstrated in Point IV, infra, the objectors' attack on the Rule 23(b)(1) class certification was not properly raised below and is unavailable to them on this appeal. Finally, in Point V, infra, we demonstrate the lack of merit in the miscellaneous individual issues raised by the objectors in their effort to emasculate the settlement agreement.

#### THE FACTS WITH RESPECT TO THE OBJECTORS

The claim of objectors -- three persons out of 479 named plaintiffs and class members -- that they suffered unique damage and are unfairly and inadequately treated by the settlement agreement is belied by their individual facts, which are briefly summarized below.\*

##### A. Clifford Ray

Appellant Ray's objections to the settlement were set forth in a one-page document, signed by Ray's attorney, stating that "Clifford Ray . . . objects to the proposed settlement in the case and intends to appear at the settlement hearing." (JA 1243) Ray did not appear at the hearing. (JA 1611) Indeed, no facts, by way of affidavit or otherwise, were offered in support of the objection,

---

\* See Pl. Br. 6-13 and JA 1079-1104, 1244-89 for a complete exposition of the history of this litigation, the factors leading to the settlement, the manner in which the settlement was achieved and the terms of the settlement agreement.

nor was any evidence offered on Ray's behalf at the settlement hearing, except that his then existing contract with the Golden State team of the NBA was put in evidence without explanation. (JA 1640-1, 1656-7) That contract guaranteed Ray, in the event the option in the contract was exercised, \$175,000 if he reported to play basketball for the 1976-77 season. (JA 1254-5) Appellants' briefs on this appeal contain no statement as to why Ray objected to the settlement.

Uncontradicted in the record, however, is a sworn statement from Gordon Stirling, a Golden State official, demonstrating that Ray's objection to the settlement was "nothing more than a tactic in his [then] present contract negotiations with Golden State." (JA 1335; see also JA 1300, 1312) The affidavit stated that less than two weeks before the settlement hearing Ray's attorney had called Mr. Stirling and stated that "he hoped Ray's negotiations for his new contract could be satisfactorily concluded before [the settlement hearing] so that the objections to the settlement could be withdrawn." (JA 1336) Mr. Stirling then stated that in a meeting he had had with Ray's attorney six days later the attorney "again told me that if agreement could be reached on Ray's contract Mr. Ray's objections to the settlement would be withdrawn." (JA 1336) Neither Ray nor his attorney disputed these statements.

B. Chester Walker

On this appeal Appellant Walker, represented by the same attorney as Appellant Ray, complains of the class action ruling below. Walker, however, is a named plaintiff who authorized in writing (JA 816; see also JA 1641) the commencement of this class action on his behalf, including the claim for damages, and, over defendants' objections, successfully obtained (JA 80) the Rule 23(b)(1) certification he now attacks.

Walker's objection to the settlement agreement, which followed his counsel's assurance that no such objection would be filed (JA 1142, 1261, 1300), is based on the fact that it "preclude[s] Walker from pursuing his private lawsuit" challenging, as a violation of the antitrust laws, the option clause in the NBA Uniform Player Contract. (J. Br. 13) Yet the original complaint in this action, filed in 1970 by Walker and the 13 other named plaintiffs (JA 949), as well as the two amended complaints (JA 147, 579-80), also alleged that the same option clause violated the antitrust laws. (The settlement, incidentally, prospectively does away with the option clause. (JA 870-3))

In September 1974, Walker signed a one-year contract with the Chicago team of the NBA, at a salary of \$165,000 per annum. The contract contained an option in Chicago's favor, permitting it to extend the contract for one additional year at the same \$165,000 salary and on the same terms. Those

terms included a guarantee that his salary would be paid regardless of performance, and that he could not be traded to another team without his consent. (JA 1257, 1326-32; see Opn. JA 1672)

In the summer of 1975, after Walker had played the 1974-75 season, the Chicago team exercised the option in Walker's contract, thereby obligating him to play for Chicago for another year at a salary of \$165,000. (JA 1257) However, unlike 1972 and 1974 when the option had also been exercised as to him (JA 1324), Walker, in 1975, announced that he was retiring from basketball (JA 1258, 1291, 1292, 1299, 1324) and refused to report to Chicago, although he admitted at the settlement hearing that had he done so he would have had a guaranteed right to receive \$165,000 (JA 1649; see also 1258, 1312-3, 1324).

Instead, on January 31, 1976 Walker brought an action against the NBA in the United States District Court for the Eastern District of Pennsylvania, contending that the option's exercise violated the antitrust laws. (JA 806-14) He did so, and moved for a preliminary injunction against enforcement of the option clause, even though, according to his testimony at the settlement hearing, he had always understood the purpose of the instant litigation was that "we were questioning the legality of the reserve clause or option situation." (JA 1647-8) Walker admitted that before 1975 he had "approve[d] of what the class counsel was doing in this case" (JA 1643, 1644) and that he was kept aware of the progress of the

litigation (JA 1645; see also JA 1643-4). In fact, he had attended meetings of the National Basketball Players Association, at which this litigation was extensively discussed. Moreover, his deposition, as well as that of his attorney, was taken (JA 797, 1258), and he served answers and supplemental answers to interrogatories and produced documents in this case (JA 433, 531, 1264).

On motion of the NBA defendants, Judge Carter temporarily restrained (JA 792) and then preliminarily enjoined (JA 850-1) Walker from prosecuting his second action, finding that it was "duplicative of the Robertson action in that it seeks identical relief from some of the identical practices challenged herein." (JA 845)\* Although Walker contended through counsel at the preliminary injunction hearing (JA 822-8, 833, 1151-4), and argues now (J. Br. 13), that his problem was somehow special and unique, the fact is that during the pendency of the lawsuit the option had been exercised by NBA teams at least 63 other times, with respect to various players including Walker and other named plaintiffs.\*\* Moreover, the only courts ever to have considered

---

\* Two years earlier Judge Carter had enjoined the prosecution of an action in the Northern District of California that conflicted with this case, the antitrust suit against the NBA defendants commenced by the American Basketball Association ("ABA") and its teams. (JA 51, 76) The ABA and its teams thereafter asserted their claims as cross-claims in this action. (JA 552)

\*\* JA 498, 529, 854, 1324, 1432, 1436, 1440, 1444, 1448, 1452, 1456, 1460, 1464.

the option's validity had enforced it,\* and Judge Carter had consistently made clear that relief, if any, concerning the option clause would have to await a full trial. (JA 363, 504-8, 839, 1142-4, 1260-2)

The preliminary injunction against Walker's suit was issued "to prevent impairment of this court's jurisdiction" and "to prevent the possibility of inconsistent rulings or relief from being rendered by another court". (JA 848)

C. Wilton N. Chamberlain

Like Appellant Walker, Appellant Chamberlain signed a document in 1970 in anticipation of this action authorizing the commencement of "one or more class actions on my behalf", including "a claim for damages on my behalf" "in order to bring about an end to any agreement among the [NBA] clubs . . . to eliminate competition among them in the acquisition of talent. . . ." (JA 680x)

In 1971 Chamberlain signed a two-year contract, containing an option for an additional year, with the Los Angeles team of the NBA. The second year of the contract, and the option year, each called for compensation of \$450,000

\* See Lemat Corp. v. Barry, 80 Cal. Rptr. 240 (1st Dist. Ct. App. 1969); Dallas Cowboys Football Club v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961); Central N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506 (Ohio Com. Pl. 1961). See also Matter of Cal. Sports, Inc. and Chamberlain, JA 204 (1973) (Seitz, Arb.). In fact, Walker's counsel himself conceded that his suit challenging the validity of the one year option asked a court to do more than any other court had ever been willing to do. (JA 1149)

per annum. (JA 215, 227, 1266; Supp. Br. 21) The contract was a no-cut contract, meaning that if Chamberlain reported to play for the Los Angeles team he was entitled to receive \$450,000 each year. (Chamberlain dep., Exs. 18, 20)

Before the beginning of the 1973-74 basketball season Los Angeles exercised the option in Chamberlain's contract. (JA 680i, 1266) Following an arbitrator's ruling that the option had been properly exercised (JA 204-37), Chamberlain "sat out" the year, i.e., he did not play with Los Angeles (JA 680j, 1266). Chamberlain also decided not to play professional basketball for the 1974-75 season, although he reportedly had a three-year \$600,000 contract to play with the San Diego team of the ABA (JA 1266; Supp. Br. 5, 21) and the Chicago and New York teams of the NBA, having obtained permission from Los Angeles to negotiate with him, told Chamberlain or his attorney they were interested in discussing with Chamberlain a contract to play basketball (dep. of A. Wirtz 5-9; dep. of Burke 62-4, 108-28; JA 1267, 1320).

Before the 1975-76 season began, Michael Burke, President of the New York team of the NBA, flew to Los Angeles to attend a meeting with Chamberlain arranged by Chamberlain's attorney. Chamberlain never appeared, and his failure to appear was never explained. According to Burke's uncontroverted affidavit, "[h]ad Mr. Chamberlain kept the appointment and met with us, the New York Knickerbockers were prepared to offer him a very substantial contract covering at least the 1975-76 season." (JA

1321) In his deposition Burke explained that in considering how much money he would have offered Chamberlain "[w]e knew he had a \$450,000 contract with the [Los Angeles] Lakers." (Dep. of Burke 123) Burke concluded that "[b]ased upon my experience with Mr. Chamberlain, it is my conclusion that he was not interested in playing professional basketball in '975-76." (JA 1322) Neither Chamberlain, who did not appear at the settlement hearing or submit any affidavits of his own in support of his objections, nor his attorney, disputed Burke's sworn statement. (See also JA 1313)

Despite Chamberlain's lack of interest in playing basketball in 1975-76, and despite this suit, of which he was "kept apprised . . . at each step of the way" (JA 1247; see also JA 1269, 1294-5; Opn. JA 1676), Chamberlain, on December 22, 1975, sued the NBA and its teams in the United States District Court for the Central District of California (JA 680), complaining under the antitrust laws of a 1975 illegal boycott against him by the NBA and its teams.

As in the case of Walker, the NBA defendants moved to enjoin Chamberlain's prosecution of his separate action. (JA 661) Judge Carter granted the motion, concluding that "the Chamberlain action is duplicative of this lawsuit. . . . Minor variations in the restraints at issue" -- Chamberlain complained of NBA rules governing a player who "sat out" the option as distinct from those governing a player who "played

out" the option -- "do not constitute new antitrust claims that are outside the scope of these proceedings." (JA 1343) In the course of the preliminary injunction hearing, and later at the settlement hearing (JA 1626-7), Chamberlain's counsel emphasized that he "is not denying that there are various grievances in the Robertson case which he supports" and he was "sure he will be adequately represented by the Robertson plaintiffs" (JA 1403, 1404).

Chamberlain's prosecution of his California action was enjoined "pending the disposition of the Robertson case." (JA 1347) Chamberlain took an appeal from that preliminary injunction (JA 855) but then withdrew it (JA 1163).

#### POINT I

##### THE FACTS WITH RESPECT TO EACH OF THE OBJECTORS SUPPORT THE FAIRNESS AND REASONABLENESS OF THE SETTLEMENT

The fairness and reasonableness of the settlement as to all class members and named plaintiffs, including the three objectors, are shown in the Brief of Plaintiffs-Appellees and Points II, III and V(C), infra. Consideration of the relevant facts with respect to each of the objectors reveals that what they claim to be their "unique" damage was either self-inflicted or non-existent. The additional fact that they specifically disclaimed any intention to challenge the terms of the settlement demonstrates further why the decision below should be affirmed.

The essence of the objections is that objectors "wish to pursue individual actions [because they] . . . can obtain substantially more in such suits than they will receive under the settlement." (J. Br. 14; see also Supp. Br. 10) The objectors contend that a settlement, endorsed by the entire basketball industry, and which "the vast preponderance of the class members willingly approved" (City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); see also Opn. JA 1612), should be disapproved because it does not cover their own allegedly special facts, which, as we show, have nothing to do with the merits of the class claim.

For example, the only evidence in the record with respect to Appellant Ray -- who in fact does not have an individual lawsuit pending -- is that his objection was asserted as "nothing more than a tactic in his present contract negotiations with Golden State." According to Ray's attorney, had those negotiations been concluded before the settlement hearing "Ray's objections to the settlement would be withdrawn." (p. 8, supra) Ray's dissatisfaction with his own contract negotiations surely does not constitute the required "clear showing that the District Court has abused its discretion [in approving the settlement]." City of Detroit v. Grinnell Corp., supra, 495 F.2d at 455. Ray's contention, like that of the objectors in Grinnell, "is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections . . ." (id. at

464). That is not the law.

With respect to named plaintiff and Appellant Walker, his attorney, who also represents Appellant Ray, stated before the settlement hearing that Walker would not object to the settlement. (p. 9, supra) Walker now complains that the settlement will "preclude Walker from pursuing his private lawsuit while failing to compensate him for the boycott which was directed against him." (J. Br. 13) Walker's challenge here reduces itself to the contention that the settlement should be overturned because the 1975 exercise of the option, the act constituting the alleged unlawful boycott, was illegal and caused him "individual and unique injury" (J. Br. 13) even though:

(i) the option, found in a variety of different commercial contracts, simply gave one side the right to continue the contract for one more year (JA 456);

(ii) during the pendency of this suit that option was exercised, without separate legal challenge, on at least 63 other occasions, including two other times with respect to Walker (pp. 10, 11 supra);

(iii) the one year option in the contracts of professional athletes has been specifically enforced by every court that has ever considered the issue (p. 12, supra);

(iv) no court, as Walker's counsel conceded, has ever held the one year option illegal and the court below said

it would not do so without a full trial on the merits (pp. 11-12, supra); and

(v) the damage Walker allegedly suffered as a result of the option's exercise would have been entirely avoided, by Walker's own admission, had he reported to play basketball for Chicago in 1975, an act that would have guaranteed him \$165,000 (p. 10, supra).\*

In short, Walker's claim was of doubtful legal validity at best and his damages were entirely self-inflicted.

Similarly, while Appellant Chamberlain asserts that the settlement does not fairly compensate him for the "boycott . . . which may have caused actual damage [of] . . . \$450,000" (Supp. Br. 26-7), the record is clear that the damage, if any, was entirely of Chamberlain's own making. The depositions and affidavits of NBA representatives established that the New York NBA team was prepared to offer Chamberlain a salary in the neighborhood of \$450,000 in 1975-76. However Chamberlain, who without explanation failed to keep a date in Los Angeles with a representative of the New York NBA team who had traveled across the country to negotiate with him, "was not interested in play-

\* In an antitrust context "[i]t is elementary that one may not recover for losses which are readily preventable or avoidable." American Can Co. v. Russellville Canning Co., 191 F.2d 38, 55 (8th Cir. 1951). See also Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 249 (2d Cir. 1959); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150, 153 (2d Cir. 1949); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826, 829 (M.D. Pa.), aff'd per curiam, 281 F.2d 481 (3d Cir. 1960).

ing professional basketball in 1975-76." (pp. 13-14, supra) Chamberlain, like Walker "may not recover for losses which are readily preventable or avoidable." American Can Russellville Canning Co., supra, 191 F.2d at 55.

In addition, Chamberlain, like Walker, expressly disclaimed any intention of objecting to the terms of the settlement. At the settlement hearing his counsel stated: "I don't want to object to what I consider a very good job by counsel for the class. . . ." (JA 1627) "Our objection to the settlement is not to the settlement . . . [but to] find some way to get out and try Mr. Chamberlain's good antitrust cause of action in this case." (JA 1626-7, emphasis added)\* Judge Carter concluded that Chamberlain "had no other objection to the settlement." (Opn. JA 1674)

As Judge Carter noted in approving the settlement:

"Chamberlain does not object to the settlement as long as his rights to continue his litigation remain unaffected by the class covenant not to sue. [Since] determination of that question is dependent upon the nature of the Chamberlain lawsuit . . . this court will give Chamberlain a full opportunity to show that his claims are not so related [to the instant case]." (Opn. JA 1682-3, emphasis added)

Despite the District Court's invitation in its July 30, 1976

\* These concessions by Chamberlain's counsel are entitled to even greater weight because Chamberlain's attorneys were the only ones who submitted statements to the District Court on Chamberlain's behalf at the preliminary injunction and settlement hearings. Chamberlain himself neither testified nor submitted any statement, sworn or unsworn.

opinion, Chamberlain waited more than six months before moving that court "to show that his claims are not so related".\*

Objectors' concessions in the District Court that they did not object to the settlement terms, and Chamberlain's delay in moving the court below to show his California action is unrelated to the instant case, are perhaps the strongest evidence of the utter lack of merit of their objections to the settlement. To allow appellants to prevail in their objections, which are based solely on contentions having nothing to do with the merits of the settlement, "would put too much power in a wishful thinker or spite monger to thwart a result that is in the best interest" of other parties to the litigation. Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972). See also American Employers' Insurance Co. v. King Resources Co., 20 F.R. Serv. 2d 161, 163 (D. Colo. 1975).

"Taken as a whole" (Opn. JA 1676) the settlement agreement treats fairly all members of the class, including the three objectors. Any "unique" damages appellants suffered for which they are not being compensated are attributable entirely to their own actions.

\* By motion dated February 8, 1977 Chamberlain moved in the District Court for an order clarifying the application of the Final Consent Judgment entered by that court. That motion, the timeliness of which is questionable, has not yet been argued.

## POINT II

### THE SETTLEMENT AGREEMENT DOES NOT PERPETUATE ILLEGAL PRACTICES

The Brief of Plaintiffs-Appellees correctly sets out the standards that apply to the approval of a class action settlement, and fully explains the reasons why the instant settlement comports with every such standard and was properly approved by the court below. Appellants do not, for the most part, dispute that Judge Carter properly applied the tests for evaluating a settlement. However, appellants would have this Court conclude that defendants' practices were indisputably violative of the antitrust laws and that the settlement agreement perpetuates such practices. (J. Br. 4)

Appellants' contentions are erroneous on two grounds. First, as the court below specifically found, a lengthy trial would have been required to determine whether the practices challenged in the complaint were in fact illegal, and the outcome of that trial was very much in doubt. Second, the settlement agreement does not "perpetuate" the challenged practices; it effects radical modifications which have removed the objections upon which the complaint was based.

Appellants' bald assertion (J. Br. 3-4) that the college draft and compensation rule are so plainly illegal as to have precluded the need for a trial, was specifically

rejected by the District Court. In its July 8, 1975 opinion dealing, among other things, with plaintiffs' contention that the practices challenged by the complaint were per se violations of the antitrust laws, the court below found that: "No final determination [on the legality of the challenged practices] could have been rendered . . . without a full-scale hearing on the merits with both sides presenting live as well as documentary evidence." (JA 505) That trial, in the court's view, would have "consume[d] two months at a minimum". (Opn. JA 1681)

Upon such a trial, two independent defenses against the allegations of the complaint would have been presented, and a finding for defendants on either would have resulted in a judgment in their favor. First, defendants would argue that the challenged practices, viewed in the context of the operation of a professional sports league, were eminently reasonable. Second, defendants would argue that, wholly apart from their reasonableness, the practices were not even subject to antitrust attack by defendants' employees because they were mandatory subjects of collective bargaining and therefore within the labor exemption to the antitrust laws. As noted above, the court below rejected plaintiffs' per se arguments, thereby requiring a full trial on the issue of reasonableness. With respect to the labor exemption, the court below, in denying defendants' motion for summary judgment,

found the applicability of the labor exemption to turn on "the sharp controversy between the plaintiffs and the NBA defendants as to whether the controversial restraints came into being in the context of arm's-length union-employer negotiations, or were imposed unilaterally by the NBA." (JA 362; see also Opn. JA 523-4) The entire issue, concluded the court below, "cannot be determined except at trial." (JA 363)

Appellants contend, in substance, that the court below committed error in its determination that the case should even go to the jury, and that this Court should disregard the view of the District Court -- whose thorough familiarity (Opn. JA 1668) with the almost seven year old case, gained through more than thirty hearings and conferences and decisions on numerous motions (JA 1082-1109), is not disputed -- and find that the practices challenged in the complaint are, as a matter of law, not subject to the labor exemption and per se illegal.

Where, as here, the issue is whether the settlement is reasonable, the several opinions of the court below reflect sufficient consideration and understanding of the issues to justify the conclusion that its finding should not be disturbed. We nevertheless discuss below some of the bases of the defenses which led the District Court to conclude that a trial on the merits was necessary. We argued there that the substantive defenses, asserted and factually developed during the course of discovery, presented difficult, if not insurmountable, barriers to recovery by plaintiffs. We discuss them here

again only to demonstrate the existence of the issues which led the court below (i) to eschew per se treatment of the challenged practices, (ii) to acknowledge the existence of the "labor" defense and (iii) to recognize the need for the lengthy jury trial which has been eliminated by the settlement agreement it approved.\*

A. A Per Se Analysis Was Properly  
Rejected By The Court Below

Both this Court and the Supreme Court have repeatedly held that rules of antitrust liability, particularly per se liability, should not be applied to factual circumstances dissimilar from those for which the rules were created.\*\* The line of cases that has given rise to the doctrine of per se illegality generally concerned agreements between business competitors in the traditional sense.\*\*\*

The individual teams of the NBA, however, are not separate entities, but rather comprise a joint venture organized to operate an integrated league, and are not competi-

\* These defenses are not discussed to elicit a determination from this Court that such defenses would have succeeded; they are offered merely to demonstrate that a trial was required to resolve genuine factual issues.

\*\* See, e.g., Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579 (1925); Kennedy v. Long Island R.R., 319 F.2d 366, 370 (2d Cir. 1963).

\*\*\* See generally, Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974).

tors in the ordinary business sense. See Levin v. National Basketball Association, 385 F. Supp. 149 (S.D.N.Y. 1974).

Each member team has a stake in the success of the other teams, and no one team is interested in driving another out of business, since if the league fails, no team can survive. See American Football League v. National Football League, 27 F.R.D. 264, 267 (D. Md. 1961).

The NBA, like all professional sports leagues, operates on the principle that the presentation of the league's "product" requires games to be played between teams that are, to the greatest extent possible, the equal of each other on the playing field. If the games between teams operated by NBA members are attractive and spectator interest in league standings and developments is maintained, the benefits to all are at their optimum. Spectators who enjoy the product are willing to pay for tickets; television and other revenues increase; and funds for increased player salaries and fringe benefits become available. (JA 481)

It is the aim of the college draft and the other challenged practices to ensure that the available pool of playing talent is distributed among the teams in such a way that those teams will be put and kept on as even a competitive basis as possible. The draft and the other practices seek to neutralize the factors that would favor or tend to favor one team. For example, a team that is financially strong,

competitively successful and geographically well located would, in the absence of other considerations, be better able than other teams to attract and employ the most talented players. (JA 482)

If the ability to compete of financially less able or less well located teams is impaired, the entire competitive structure of the league is jeopardized. Accordingly, professional sports leagues must take steps to protect themselves from this possibility, steps that would be forbidden in standard commercial settings.

The unique structure and operation of professional sports leagues has led virtually every court that has considered the question to reject per se treatment of their practices. In 1953, a District Court concluded, after a non-jury trial involving a thorough review of all phases of National Football League ("NFL") operations, that the member teams of the NFL were legally justified in agreeing not to permit any member of the League to televise its games within the home area of any other member of the League on a day when the latter was playing a game at home. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953). In no other business context could such an antitrust result have been reached. In no other pattern of business relationships would such a decision have remained unappealed by the Antitrust Division.

In the course of that opinion, the court described the relationship among the member clubs of the NFL as follows:

"Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably." 116 F. Supp. at 323.\*

The recent spate of sports litigation does not indicate any trend away from the Rule of Reason analysis which appellants would sweep away with their talismanic invocation of the per se doctrine. See Mackey v. National

\* To the same effect is Cappadona v. New England Patriots Football Team, Civ. No. 72-1119-W (D. Mass. March 7, 1974), where Judge Wyzanski observed:

"[T]he parties assume and the court assumes that there is a difference between the scope permissible under the antitrust laws to businesses which operate professional sports to combine and limit their freedom from what would be permissible with the business, ordinary commercial enterprises, producing, marketing or otherwise handling tangible goods." (Trial Trans. 490)

Football League, 543 F.2d 606, 620 (8th Cir. 1976) (" . . . we think it more appropriate to test the validity of the Rozelle [compensation] Rule under the Rule of Reason"); Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (" . . . in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute per se test sometimes applied by the courts in other fields").\*

That the draft and other challenged practices work restraints upon teams -- and players -- cannot be denied, but as Judge Kaufman observed in Molinas v. National Basketball Association, 190 F. Supp. 241, 243-4 (S.D.N.Y. 1961): "Every league or association must have some reasonable governing rules," and "although by its nature it may involve some sort of a restraint, [it] does not run afoul of the anti-trust laws."\*\* The

\* Even in Smith v. Pro-Football, 420 F. Supp. 738 (D. D.C. 1976), relied upon by appellants (J. Br. 4-5), decided prior to the Eighth Circuit's decision in Mackey, the conclusion that professional football's unmodified college draft amounted to a per se violation was reached only after a trial which explored in detail the operations of the NFL.

\*\* Robert H. Bork, the most recent Solicitor General of the United States, recognized the extraordinary status of professional sports leagues when he observed that:

"There are some activities, however, which could not exist at all without the restraint and these should be lawful no matter what the market share of the parties. A prime example is league sports. . . ." R. Bork, "Resolved: Present Antitrust Restraints on Pricing Should Be Relaxed," 41 ABA Antitrust L.J. 8, 13 (1971).

Professor Bork, as he then was, would have gone so far as to legalize all internal restraints within a league (as opposed to restraints between competing leagues) by analogizing the league to a partnership or firm.

player draft and other challenged practices, which seek to preserve the competitive balance among the NBA teams and which have attracted the monetary commitments necessary for the league's growth, meet the test of reasonableness, for without the revenues which flow from the presentation of the league product there would be no funds for payment of player salaries and fringe benefits, and without a league structure, there would not even be a market for the services of most players.

In short, there is no precedent to which appellants can point which supports their argument that the practices challenged by the complaint could have been branded illegal without a thorough examination, which only a lengthy trial would have afforded, of their origin, purpose, nature and effect.

B. The Labor Exemption Was A Critical Issue To Be Tried In This Case

It is now established that, by reason of the strong national policy favoring collective bargaining, practices which might otherwise be tested by antitrust standards are protected against such attack if they result from dealings between employers and organized employees. While the exact application of the labor exemption to professional sports is yet to be fully defined\*, it is clear that the labor exemption applies at least to those practices which: (1) primarily affect only the parties to the collective bargaining relationship; (2) are man-

\* See the dissenting opinion of Justice Marshall in Flood v. Kuhn, 407 U.S. 258, 293-6 (1972).

datory subjects of collective bargaining\*\*; and (3) arise in the context of a bona fide arm's-length collective bargaining relationship. See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965); Mackey v. National Football League, supra. Applying these standards here, it is apparent that, whatever the strength of plaintiffs' case on the reasonableness of the restraints, defendants had a sound basis for invoking the labor exemption.

The practices attacked by plaintiffs -- the college draft, the option clause and compensation -- relate only to the NBA and its players. These practices are not directed at and do not affect outsiders to the collective bargaining relationship. In this case, as in Jewel Tea, there is and can be no "claim of a union-employer conspiracy against" a third party. Jewel Tea, supra, 381 U.S. at 688. Unlike in Pennington, the union and the employer have not "conspire[d] to eliminate competitors from the industry." Pennington, supra, 381 U.S. at 666. See also Mackey, supra, 543 F.2d at 615, where the court found it "clear that the alleged restraint on trade effected by the Rozelle Rule [of the NFL] affects only the parties to the agreements sought to be exempted."

\* The Labor Management Relations Act, §8(d) (29 U.S.C. §158(d)), requires "the employer and the representative of the employees to ... confer in good faith with respect to wages, hours and other terms and conditions of employment...." These areas are commonly referred to as "mandatory subjects" of collective bargaining.

Accordingly, the relevant issues below, with respect to the applicability of the labor exemption, were whether the challenged practices are mandatory subjects of collective bargaining and whether the practices arose in the context of a bona fide collective bargaining relationship.

1. Mandatory Subjects Of  
Collective Bargaining

In determining whether particular matters are mandatory subjects over which parties are required to bargain, the courts -- and in particular the Supreme Court -- have adhered to an expansive definition, in order properly to give effect to the underlying policy favoring collective bargaining. Given the broad definition of what constitutes a mandatory subject, defendants argued below (and plaintiffs, of course, disagreed) that the practices challenged in the complaint affect the "wages, hours and other terms and conditions of employment" of players in the NBA and are therefore matters about which the players' union and the owners must negotiate.

Indeed, the General Counsel of the National Labor Relations Board has already so determined. During negotiations between the NBA and the National Basketball Players Association ("Players Association" or "NBPA") in the summer of 1975 regarding a new collective bargaining agreement, the NBA proposed to bargain over the college draft, the option clause and compensation, and the Players Association refused to discuss these

subjects. The NBA thereupon filed an unfair labor practice charge, and the NLRB's General Counsel decided that a complaint should issue (National Basketball Players Association, Case No. 2-CB-5948, 4 AMR ¶10,037 (1976)):

" . . . it is clear that the broad subject areas are mandatory subjects of bargaining and that accordingly the NBPA's refusal to bargain regarding these areas was unlawful. Thus, the college draft, as a hiring system, is the principal mechanism by which prospective employees are employed. The mechanism by which potential employees are hired is a mandatory subject. Similarly the option clause directly controls both duration of employment and salary. Finally, the issue of compensation has a substantial impact upon player-employees' ability to transfer between employers within the multi-employer unit."\*

The same conclusion has been reached when similar practices have been considered in litigation involving other professional sports leagues. In Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), aff'd, 443 F.2d 264 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972), "[b]oth management and the [baseball] Players' Association recognize[d] the reserve system to be a mandatory subject of collective bargaining." 316 F. Supp. at 283. Similarly, in Smith v. Pro-Football, supra, 420 F. Supp. at 743, the court observed:

"In light of the acceptance of such practices as the hiring hall . . . and seniority as determinants of the structure of the labor market in a particular industry and of the opportunity for employment in a given place

\* Because of the compromise reached between the NBA and its players, the NBA requested that the complaint proposed to be issued by the NLRB be withheld as moot. (JA 1314, 1319)

at a given time, it seems probable that each feature of the draft as to which plaintiff raises antitrust objections would also be considered a [term] or condition of employment."

See also Mackey v. National Football League, supra, where the Eighth Circuit held that the NFL's Rozelle Rule, regarding inter-team compensation when a player's contractual obligation to one team expires and he is signed to play for another, is a mandatory bargaining subject. 543 F.2d at 615.

In short, it is "obvious that reserve or option clauses are mandatory subjects of bargaining under the National Labor Relations Act." M. Jacobs & R. Winter, "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," 81 Yale L.J. 1, 10 (1971).

2. Proof of the Issue of Bona Fide Collective Bargaining Relationship

If, as the authorities reviewed above indicate, the practices involved in this litigation were mandatory subjects for collective bargaining, the applicability of the labor exemption would ultimately turn upon the factual bona fides of the collective bargaining relationship between the NBA and the Players Association, the strength of the parties to that relationship and the history of their bargaining.

The facts on these issues were very much in dispute, leading the court below to recognize the need for a trial. (JA 362) Appellants' attack on the settlement agreement

necessarily includes an argument that the labor exemption, and the facts upon which .. was premised, should have been summarily excluded from consideration by the trial court. Upon the assumption that this Court may wish to look behind the District Court's conclusion that there existed issues of fact upon which the application of the labor exemption turned, we outline below some of the factual allegations that led the court below to its conclusion.

Principal among the facts to be offered at trial was that the Players Association was and is the strongest and most effective union in professional sports. By 1973, it had achieved the highest per diem rate of pay for expenses in professional sports, the only severance pay plan in professional sports, the only disability program of its type in professional sports and perhaps the best arbitration and grievance system in all of professional sports. (Stern Oct. 15, 1975 Aff., Ex. B)\*

Proof would have been offered by defendants at trial to demonstrate that these benefits were not "bestowed" on the

\* Other benefits achieved by the Players Association at the collective bargaining table include a substantial allowance for moving expenses for a player whose contract is assigned to another team, a minimum salary for new players, an \$850,000 "playoff pool" for distribution to players participating in playoffs, medical, dental and disability insurance, a fund for severance pay requiring yearly contributions from NBA members of over \$400,000, full pension benefits for eligible players at age 50, a limitation on the number of games to be played each season and a minimum number of active players per team.

players by the NBA employers, but were "gained" by the players in classic concerted activity undertaken by the Players Association as early as 1964. (JA 188, 194-5; dep. of Wilkens 76-90) The collective bargaining agreement of April 29, 1976, reflecting the Players Association's adoption of the terms of the settlement agreement, was the seventh collective bargaining agreement between it and the NBA, the first having been signed in 1967. (JA 189)

The undisputed achievements by the Players Association would have been proven at trial to demonstrate that there had existed in the NBA for at least the last ten years a bona fide arm's-length collective bargaining relationship; that the practices at issue had not been "thrust upon" a weak and ineffectual union (cf. Smith v. Pro-Football, supra, 420 F. Supp. at 743); and that the Players Association had demonstrated over the years that it is strong enough to engage in bona fide bargaining over all matters relating to the employment of players, including the challenged practices.

Defendants were also prepared to offer proof that the Players Association had actually bargained over the challenged practices. Documents produced in the course of discovery showed that the Players Association had, on several occasions, placed at least some of the challenged practices on

collective bargaining agendas,\* conducted internal discussions on collective bargaining proposals to modify the challenged practices\*\* and discussed several such proposed modifications at collective bargaining meetings with NBA representatives.\*\*\* Proof would also have been offered that, to the extent the practices remained unchanged, they were knowingly acquiesced in by the Players Association, in return for other benefits.

This brief glimpse at the NBA's collective bargaining history is, of course, not offered to convince this Court that the labor exemption defense would have been upheld, but rather to demonstrate that genuine issues of fact existed with respect to a defense which, if sustained, would have denied plaintiffs any recovery whatsoever. Thus, even had the settlement agreement continued in existence the very practices challenged in the complaint, appellants could offer no basis upon which this Court could conclude that the court below had abused its

---

\* A letter to the NBA from the Players Association dated June 1, 1966 reflects inclusion in the agenda for discussion between the Players Association and the NBA:

" . . . A workable plan toward the elimination of the present contractual arrangement, under which the players are unable to negotiate with any other team during their tenure in the NBA." (JA 196)

See also, e.g., Fleisher dep., Ex. 117.

\*\* See, e.g., Fleisher dep., Ex. 122.

\*\*\* See, e.g., Wilkens dep., Ex. 34.

discretion in approving such an agreement.\* In light of the radical modifications, as detailed in the Brief of Plaintiffs-Appellees (pp. 9-12, 41-50), the settlement agreement made with respect to those practices -- all to the benefit of the players -- appellants' arguments become almost frivolous, and should be summarily rejected.

### POINT III

#### THE COMPROMISE BETWEEN THE NBA AND ITS PLAYERS RESULTED FROM BONA FIDE ARM'S- LENGTH BARGAINING FOR THE BENEFIT OF PAST, PRESENT AND FUTURE NBA PLAYERS

In Point II B, we demonstrated that, apart from all the other reasons why the settlement agreement was properly found fair and adequate, it could be sustained on the single ground that a defense based on the labor exemption to the antitrust laws presented a formidable obstacle to plaintiffs' success at trial. Appellants apparently contend that, even so, the terms of the settlement agreement are themselves not protected by the labor exemption and therefore run afoul of the Sherman Act. They say that the settlement agreement is not the product of the bona fide arm's-length bargaining which would immunize it from attack by appellants.

Our response is twofold:

\* See Grunin v. International House of Pancakes, 513 F.2d 114, 123-4 (8th Cir.), cert. denied, 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 454-5 (2d Cir. 1974); Newman v. Stein, 464 F.2d 689, 692-3 (2d Cir.), cert. denied, 409 U.S. 1039 (1972).

First, as demonstrated in Point II A, the settlement agreement contains no illegal terms, and the reasons supporting the approval of the settlement, as set forth in this Brief and that of Plaintiffs-Appellees, stand independent of any labor exemption to the antitrust laws.

Second, were this Court to find it necessary to reach the issue of the applicability of the labor exemption to the settlement agreement (and the contemporaneous collective bargaining agreement reflecting adoption of its substantive terms by the Players Association), it could not seriously be disputed that the peace those documents brought to professional basketball was in fact the product of bona fide arm's-length bargaining.

Appellants claim that "no genuine arms-length bargaining occurred" and that the labor exemption therefore cannot apply, for the sole reason that the agreement will affect future NBA players who "have in no way been represented in the negotiations of the settlement agreement."

(J. Br. 7) The defects in this argument are manifest: (1) the hard-fought terms of the settlement and collective bargaining agreements clearly reflect concern for future players; and (2) there is no suggestion in any of the labor exemption cases that an agreement otherwise entitled to the exemption loses the exemption because it has an impact on potential future employees.

There can be no serious question -- and appellants have not attempted to raise one -- that the settlement and collective bargaining agreements were the result of intensive and difficult negotiations between well-matched adversaries. These agreements provide for significant changes in the NBA's system of player allocation which will benefit all players -- those currently active and those yet to come. Indeed, the agreements contain terms negotiated exclusively for the benefit of future players. For example, the college draft rules have been modified so that a team will have the exclusive right to negotiate with a drafted player for only one year.

(JA 863-9) As Plaintiffs-Appellees state in their Brief (p. 12): "The negotiating positions of rookie players thus have been greatly improved . . . ." Moreover, under the terms of the agreements, as amplified in a letter agreement between the parties dated July 26, 1976 (JA 911a-911c), if an NBA team wishes to sign a "rookie" to a long term (i.e., four or five year) contract, it must offer him specified compensation more than triple the NBA's minimum salary. (Opn. JA 1680-1)\*

Of course, modifications of the draft and the compensation rule were secured for the benefit of all players -- present and future -- and the elimination of the option clause as well as the prospective first refusal provision were secured solely for the benefit of players who would be in the NBA at the time they become effective. In light of these benefits secured

\* The current minimum salary under the terms of the April 29, 1976 collective bargaining agreement is \$30,000.

for future players, including the NBA's covenant in the settlement agreement never to return to the practices challenged in the complaint (JA 901), there is simply no substance to appellants' assertion that the interests of such players were not represented in the negotiations leading to the settlement and collective bargaining agreements.\*

Appellants have also failed to allude to a single authority to support the novel argument (which in any event we submit they lack standing to assert) that any agreement that has an impact on potential future employees cannot enjoy the benefit of the labor exemption. Since collective bargaining agreements almost invariably cover and affect all members of the bargaining unit, whether or not they were members at the time the agreement was negotiated, there would be little left of the labor exemption if appellants' views were to prevail. In fact, those views were specifically rejected in Smith v. Pro-Football, supra, 420 F. Supp. at 744, where the court found that the fact that an agreement affected potential employees did not preclude the application of the labor exemption:

"With regard to the fact that the boycott's impact is on potential employees rather than on competitors of the employer, however, the Court believes that the policies of the labor laws require that such an agreement be found to be within the scope of the exemption to the antitrust laws."

\* There is a substantial question as to whether appellants -- all veteran players including two who have retired -- even have standing to assert the alleged rights of future players. See Pl. Br. 37 n\*.

Accordingly, that the settlement and collective bargaining agreements may apply to "children now in elementary school" (J. Br. 7) in no way supports the conclusion that those agreements were not the product of bona fide arm's-length bargaining or that they are not entitled to the benefit of the labor exemption from the antitrust laws.

#### POINT IV

#### THE CLASS ACTION ISSUES ARE NOT PROPERLY RAISED ON THIS APPEAL

The correctness of the District Court's ruling that this case can be maintained as a class action under Rule 23(b)(1) is fully developed in the Brief of Plaintiffs-Appellees. That question need not, however, be reached, because (a) appellants are estopped by their conduct from raising it and (b) to allow them to challenge the certification at this stage of the proceeding would give them the unjustifiable "heads-I-win, tails-you-lose" advantage to which courts have referred as "one-way intervention".

#### A. Appellants Are Estopped From Challenging The Class Action Ruling

The essence of appellants' objections is that the comprehensive settlement endorsed by all in the class except three objectors should be overturned because it applies to the entire class. The settlement agreement provides that any modification of the judgment would give either side the option

of declaring it null and void. (JA 863) Therefore, to allow appellants, after six years of litigation, in effect to voluntarily dismiss this action as to themselves so they can prosecute their separate actions would not only jeopardize the settlement, but would also deprive the players, the NBA and its teams of their negotiated opportunity to end that litigation.

Examination of the objections of the two appellants who have purported to set them forth\* shows that, as a matter of fact and law, they cannot now challenge the class action ruling.

1. Chester Walker

As a named plaintiff who moved the court below for Rule 23(b)(1) class action certification, appellant Walker obviously lacks standing to claim now that the ruling he sought was erroneously issued. Walker is simply wrong in asserting that "a procedure by which the majority of named plaintiffs may force another named plaintiff to accept a resolution of his lawsuit against his will. . . is obviously contrary to the Fifth Amendment." (J. Br. 13)\*\*

\* The objection of Appellant Ray should be treated as a nullity, since it was asserted for reasons having nothing to do with this lawsuit and was unsupported by any facts (see pp. 7-8, 16-17, supra).

\*\* Flinn v. FMC Corp., 528 F.2d 1169, 1174 n.19 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971); Bogges v. Hogan, 410 F. Supp. 433, 438 n.7 (N.D. Ill. 1975).

Moreover, as regards a named plaintiff like Walker, the class certification -- be it pursuant to Rule 23(b)(1) or 23(b)(3) -- makes no difference. Even had this action been certified as a Rule 23(b)(3) class action, Walker would not have been afforded the opportunity to opt out. Such an opportunity in a Rule 23(b)(3) class action is available to class members, not named plaintiffs. See Fed. R. Civ. P. 23(c)(2).

2. Wilton N. Chamberlain

While Chamberlain on this appeal attacks the class action ruling, his position below was quite different. He specifically authorized the commencement of "a class action on [his] behalf." (JA 680x) At the hearing on the NBA's motion to preliminarily enjoin prosecution of his duplicative Los Angeles action, his counsel stated that Chamberlain did not object to the class action ruling or to being included as a member of the Robertson class. "Mr. Chamberlain is not denying that there are various grievances in the Robertson case which he supports. He is not...challenging in any way anything that has been done in this court", including, presumably, the earlier class action ruling. (JA 1404, emphasis added) Chamberlain was "sure he will be adequately represented by the Robertson plaintiffs." (JA 1403) As his counsel explained, he "would like to do both," that is "get into the case," insofar as it concerned events

before September 1975, and "get out of the case" to the extent it covered events after that time. (JA 1402, 1403)

The lengthy objection Chamberlain filed in opposition to the settlement (JA 1226) made no reference to the class action ruling. In addition, at the settlement hearing itself, Chamberlain's counsel stated that "I don't want to object to what I consider a very good job by counsel for the class." (JA 1627)

Rather than object to the class action ruling or the terms of the settlement, Chamberlain's real concern was to "find some way to get out and try Mr. Chamberlain's good antitrust cause of action in this case" (JA 1627), a procedure we show below to be impermissible (see pp. 44-52, 59-69, infra).

Chamberlain should not be permitted on this appeal to abandon his prior endorsement of this class action.

3. As a Matter of Law, Appellants Are Estopped from Challenging the Class Action Ruling

Air Line Stewards Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974), relied upon by Chamberlain (Supp. Br. 29-30), further confirms why appellants, who without objection reaped the benefits that flowed to the players in the NBA as a result of this class litigation, are estopped from now challenging

the class certification.

This class action was brought, following written authorization from Walker and Chamberlain (JA 316, 680x), as well as the other named plaintiffs and class members, in April 1970 and was fiercely litigated for over six years. The entry of a preliminary injunction in May 1970 preventing the merger of the NBA and ABA (JA 48, 1087-8) resulted in substantial monetary and contractual benefits to all members of the class -- including appellants (JA 1104-6, 1283). The bringing of a contempt motion in 1972 caused the court to warn defendants of the need to maintain competition over player services, competition which resulted in higher player salaries. (JA 38, 1089-90) In addition, the efforts of the class and their counsel caused Congress to refuse to grant a statutory exemption to the merger. (JA 1105)\*

The notice sent to all class members in September 1975 advised them of the pendency of this class action and told them they could be separately represented and move "to intervene as a party plaintiff or otherwise become a party to the litigation." (JA 541) No such application was made, nor was any motion brought to decertify or otherwise object to the class

---

\* A complete description of the benefits achieved for the class in general and these appellants in particular during the pendency of this action is set out in Pl. Br. 6, 10-12 and 31 and JA 1104-6, 1256-7, 1266.

action ruling. Moreover, the class -- including appellants -- was apprised of the developments and progress of the action at each stage of the proceedings, by the numerous letters sent to, and meetings held with, the NBA players (JA 1247, 1264, 1269, 1294-6, Opn. JA 1676), and through the depositions of 84 different named plaintiffs, class members and their attorneys or agents -- including Chamberlain, Walker and the attorney for Walker and Ray (JA 797, 821, 1097-8, 1236-9, 1258, 1466).

As the Seventh Circuit in Air Line Stewards,  
supra, wrote:

"We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and 'spoiling' a settlement obtained by such efforts." 490 F.2d at 643.\*

If ever there were a case in which "individual members of a class so clearly acquiesced in and accepted the efforts of" class representatives and class counsel "for

\* See also with respect to estoppel of class members in a class action context, In re Four Seasons Sec. Laws Litigation, 525 F.2d 500, 502-3 (10th Cir. 1975); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 804 (3d Cir.), cert. denied, 419 U.S. 900 (1974); Mungin v. Florida East Coast Ry., 318 F. Supp. 720, 735 (M.D. Fla. 1970), aff'd per curiam, 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971); Powell v. Pennsylvania R.R., 166 F. Supp. 448, 456 (E.D. Pa. 1958), rev'd on other grounds, 267 F.2d 241 (3d Cir. 1959).

so long a period and under such circumstances that they would be estopped" from excluding themselves, this is that case. Moreover, as the Fourth Circuit admonished in Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976), approving a class action settlement over the objection of certain named plaintiffs and class members:

"It is what [the objectors] are individually to receive out of that settlement that prompts their objection and this appeal. . . . It must be borne in mind, though, that the appellants chose to bring their action as a class action, over the objection of the appellee. In so doing, they disclaimed any right to a preferred position in the settlement." 528 F.2d at 1176.

Appellants, in search of a "preferred position in the settlement", cannot be permitted, in the words of Chamberlain's counsel, to "do both," that is "get into the case . . . and get out of the case." (JA 1402, 1403) Appellants have so very clearly "acquiesced in and accepted the efforts [on their behalf] . . . for so long a period and under such circumstances that they [are now] estopped from exercising their right to exclude themselves and 'spoiling' a settlement obtained by such efforts." Air Line Stewards, supra, 490 F.2d at 643.

Most telling is this Court's observation that "... those who develop late theories about 'special damages' do so at their peril." Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1049 (2d Cir.), cert. denied, 414 U.S. 1092

(1973). Even the fact that a class member might have received a larger recovery in another action is no reason to prevent him from being bound by a settlement encompassing his claim. Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183, 1186 (2d Cir. 1974). Appellants are thus estopped from challenging the class action certification.

B. To Allow Appellants Relief From The  
Class Action Certification At This  
Stage Of The Proceedings Would Permit  
"A Return To One-Way Intervention"

In seeking to challenge the Rule 23(b)(1) certification, appellants pose the classic example of what the courts and commentators have called one-way intervention. They argue, in effect, that while they authorized in 1970 the commencement of this class action on their behalf, knew of the February 1975 class action ruling and in September 1975 received notice of the class action certification, they decided to wait and see what would happen. If plaintiffs won the case, or if it was settled to appellants' satisfaction, they would not challenge the class action ruling. On the other hand, if plaintiffs lost the case or if, as is true here, appellants did not like the settlement, they would argue the case should have been certified under (b)(3) so as to permit them to opt out. Such one-way intervention cannot be allowed. Appellants can challenge, albeit unsuccessfully, the fairness of the settlement agreement, but they cannot use this appeal as a vehicle to attack the class action ruling.

At the settlement stage, every class action in which, as here, notice of class certification has been previously sent to the class -- be it a Rule 23(b)(1), (b)(2) or (b)(3) class action -- is procedurally identical. Rule 23(e), governing the settlement phase of class actions, makes no distinction among the three types of class actions. The opportunity to opt out of a Rule 23(b)(3) class action is afforded to class members at the notice of pendency stage, not at the time of notice of settlement pursuant to Rule 23(e).<sup>\*</sup> To afford a class member an opportunity to opt out after settlement, or indeed at the settlement stage of a class action in which the notice of pendency had been previously sent, would clearly be improper, for it would invite "a return to one-way intervention under a new guise." Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968).

As the Advisory Committee's Note to Rule 23 makes clear, the 1966 amendments were specifically intended to eliminate this possibility. 39 F.R.D. 69, 105-6 (1966). Under Rule 23 as it existed prior to the 1966 amendments, a class member could wait until after final judgment to decide whether or not he wished to be bound by it. As the Supreme Court has recently stated, this one-way intervention was a "recurrent source of abuse under . . . former Rule [23] [which] . . . [t]he 1966 amendments were designed, in part, specifically

<sup>\*</sup> See, e.g., 1 Pt. 2 J. Moore, Federal Practice, "Manual For Complex Litigation", Appendix 1.45, Sample Order and Notice of Proposed Settlement at 212-7 (2d ed. 1975).

to mend. . . ." American Pipe & Construction Co. v. Utah,  
414 U.S. 538, 547 (1974).

Precisely that which appellants seek to achieve was explicitly condemned in In re International House of Pancakes Franchise Litigation, 536 F.2d 261 (8th Cir. 1976). As the court there wrote:

"It is difficult to escape the conclusion that appellant in fact hoped to gain the best of both worlds by remaining in the class if the outcome were favorable and withdrawing if it were adverse. In other words, appellant was attempting to achieve the very evil that Amended Rule 23 sought to eliminate -- [one-way intervention] . . . ." 536 F.2d at 263 n.1.

Similarly, in In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974), the attempt by a class member, in effect, to opt out of a class action at the settlement stage of the proceedings was rejected because to allow this would invite a return to one-way intervention. The Tenth Circuit stated:

"In reaching this conclusion we are guided by the purpose of the rule to prevent one-way intervention, the interests in the finality of judgments, and related case law precedent. To uphold the decision of the court below would, in our opinion, offer 'a return to one-way intervention under a new guise.'" 502 F.2d at 843.

Appellants' conduct at the time of class action certification and notice thereof gives no reason to suppose that they would have opted out had they been given the opportunity to do so by a Rule 23(b)(3) certification. In fact,

the record suggests just the contrary, in light of appellants' authorization of the suit, the communications they received advising them of its progress, and the benefits conferred upon them during its pendency (see pp. 45, 46, supra). The failure of appellants, all of whom are regularly represented by knowledgeable counsel (JA 1246), to challenge the (b)(1) certification until the settlement hearing, and their lack of showing that they would have opted out had they been allowed to do so, precludes them from now making this belated attack on the (b)(1) certification.

To allow class members to challenge a (b)(1) certification after settlement has been reached would jeopardize the chances of ever settling such a class action. Defendants, who by settling assume they are buying peace, will obviously be reluctant to settle if a class member can subsequently claim -- either on appeal or in a second law suit -- that the case should have been certified under (b)(3), that he should thus have been allowed to opt out, and therefore that the defense of res judicata raised against his subsequent individual suit must fail.\* That was the reasoning of the court in In re Four Seasons Securities Laws Litigation, 63 F.R.D. 422, 429 (W.D. Okla. 1974), aff'd, 525 F.2d 500 (10th

\* In fact, such a procedure would be completely repugnant to Rule 23(c)(3) which provides that "[t]he judgment . . . whether or not favorable to the class, shall include . . . those whom the court find to be members of the class." See, e.g., Research Corp. v. Asgrow Seed Co., 425 F.2d 1059, 1060 (7th Cir. 1970); Smith v. Alleghany Corp., 394 F.2d 381, 391 (2d Cir.), cert. denied, 393 U.S. 939 (1968).

Cir. 1975), which held that a (b)(3) class member should not be permitted belatedly to opt out after a settlement had been approved by the court: "Defendants", the court wrote, "will be loath to offer substantial sums of money in compromise settlement of class actions unless they can rely on compliance with the provisions of Rule 23 to bind class members."\*

Since to allow appellants to now challenge the class action certification would countenance a return to the discredited notion of one-way intervention, this Court should not reach the issue of the correctness of the District Court's class certification ruling, which in any event is fully dealt with in the Brief of Plaintiffs-Appellees.

#### POINT V

#### THE INDIVIDUAL ISSUES RAISED BY APPELLANTS ARE WITHOUT MERIT

Appellants Chamberlain and Walker, but more particularly Chamberlain, purport to challenge the preliminary injunctions issued by the court below against prosecution of their related actions, and the provisions in the settlement agreement authorizing the issuance of such injunctions in appropriate cases in the future. Those issues cannot be argued to this Court at this time. The only proper question

\* See also American Employers' Ins. Co. v. King Resources Co., 20 F.R. Serv. 2d 161, 163 (D. Colo. 1975): "[A] rule which permitted an objector to 'opt out' or block compromises of 23(b)(1) or (b)(2) actions would invariably result in the collapse of on-going settlement negotiations or would preclude such negotiations entirely."

on this appeal is whether there is "a clear showing that the District Court has abused its discretion" in approving the settlement. City of Detroit v. Grinnell Corp., supra, 495 F.2d at 454. In any event, the issuance of injunctions to halt the prosecution of duplicative litigations, and the inclusion in the settlement agreement of a covenant not to sue and a provision giving the District Court jurisdiction to resolve disputes arising under the settlement, are clearly proper.

A. The Validity Of The Preliminary Injunction Is Not Before This Court

In his brief Chamberlain "requests this Court...to vacate the preliminary injunction issued by the District Court". (Supp. Br. 32) That issue cannot be raised on this appeal.

First, Chamberlain consented to the issuance of the preliminary injunction. At the preliminary injunction hearing, his counsel told Judge Carter that if the NBA defendants "want a stay of the Los Angeles action until you finish this proceeding on the liability phase, I don't really have any problem with that. . . . I am willing to have Mr. Chamberlain's lawsuit stayed until you rule on [the liability aspect of the instant case]." (JA 1408, 1410; see also JA 1152) A party cannot appeal from an order to which he consented.\*

\* See, e.g., Thonen v. Jenkins, 455 F.2d 977 (4th Cir. 1972); Martin Marietta Corp. v. FTC, 376 F.2d 430 (7th Cir.), cert. denied, 389 U.S. 923 (1967); Stewart v. Lincoln-Douglas Hotel Corp., 208 F.2d 379 (7th Cir. 1953); Kelly's Trust v. Commissioner, 168 F.2d 198 (2d Cir. 1948).

Second, the preliminary injunction, by its own terms, was only to remain in effect "pending the disposition of the Robertson case." (JA 1347) In his opinion granting the preliminary injunction, Judge Carter wrote:

"If the Chamberlain case includes claims that are outside the scope of this suit, they will survive the decision or settlement of this case. After the termination of this action Chamberlain will be free to pursue any claim of right not finally determined in this class suit." (JA 1346)

Third, even if there were some ambiguity as to the duration of the preliminary injunction -- and there is none -- the law is clear that "a preliminary injunction is ipso facto dissolved by a dismissal of the complaint or the entry of a final decree in the cause."\*

If Chamberlain thought the preliminary injunction was erroneously issued his proper remedy was to appeal from its entry.\*\* In fact, Chamberlain did appeal from the injunction (JA 855) but subsequently dismissed the appeal (JA 1163) in favor of raising objections at the settlement hearing.

Neither Chamberlain nor Walker can use this appeal to challenge an injunction that has expired by its terms.

\* 7 J. Moore, Federal Practice ¶65.07 at 65-86 (2d ed. 1975). See also Wickes Corp. v. Indus. Financial Corp., 493 F.2d 1173 (5th Cir. 1974); Heasley v. United States, 312 F.2d 641 (8th Cir. 1963); Rio Hondo Harvesting Ass'n v. Johnson, 293 F.2d 426 (5th Cir. 1961); Sweeney v. Hanley, 126 F. 97 (9th Cir. 1903); 11 C. Wright & A. Miller, Federal Practice and Procedure §2947 (1973).

\*\* 28 U.S.C. §1292(a)(1).

B. The Res Judicata Effect Of  
The Judgment Below Cannot  
Be Considered On This Appeal

Chamberlain also asks this Court to rule that the judgment below "shall not constitute res judicata . . . of his damage claim as asserted in the California action". (Supp. Br. 33) That contention too cannot be raised on this appeal.

While "[j]udgments rendered in class actions . . . will bind non-party class members . . . including persons who have intervened or objected,"\* whether the judgment in the first action will constitute a res judicata bar to the second suit cannot be determined now. "[I]t is well settled that the court adjudicating a dispute cannot pre-determine the res judicata effect of its own judgment; that can be tested only in a subsequent suit."\*\*

Thus, this Court should not determine on this appeal the res judicata effect of the judgment below.

\* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059, 1060 (7th Cir. 1970). See also Fed. R. Civ. P. 23(c)(3); Smith v. Alleghany Corp., 394 F.2d 381 (2d Cir.), cert. denied, 393 U.S. 939 (1968); Schwartzman v. Tenneco Mfg. Co., 375 F.2d 123 (3d Cir. 1967); In re Antibiotic Antitrust Actions, 333 F. Supp. 296 (S.D.N.Y.), aff'd sub nom. Connors v. Chas. Pfizer & Co., 450 F.2d 1119 (2d Cir. 1971); American Employers' Ins. Co. v. King Resources, 20 F.R. Serv. 2d 161 (D. Colo. 1975).

\*\* 7A C. Wright & A. Miller, Federal Practice and Procedure §1789 at 176 (1972). See also West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 747 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Cherner v. Transitron Elec. Corp., 221 F. Supp. 48, 53 (D. Mass. 1963); 3B J. Moore, Federal Practice ¶23.60 (2d ed. 1977).

C. The Covenant Not To Sue And  
The Continuing Jurisdiction  
Provisions In The Settlement  
Agreement Are Proper

Chamberlain complains "of the inclusion of a covenant not to sue", and "a provision vesting continuing exclusive jurisdiction in the District Court to enforce the terms of the Settlement". (Supp. Br. 12) He contends that this "judgment provision which effectively permanently enjoins Chamberlain from prosecution of his California action" (Supp. Br. 16) -- although inserted to protect the interests of class members (JA 1287-8) -- "is simply not justified by the record". (Supp. Br. 16) However, the cases -- including the leading cases in this Court which have approved settlements containing terms identical to those challenged here -- make clear that both covenants not to sue and continuing jurisdiction provisions are standard, and reasonable, in class action settlement agreements.

The settlement agreement provides that the class members "covenant not to sue any of the Settling Defendants . . . with respect to any claim relating to or arising out of the claims set forth in the Complaint". (JA 904)\* Breach of contract suits, such as possible contract actions by Walker

\* Texaco, Inc. v. Fiumara, 232 F. Supp. 757 (E.D. Pa. 1964), relied upon by Chamberlain (Supp. Br. 17), does not cast doubt on the propriety of this covenant. The court there, after observing that "a federal court has the requisite power to secure and preserve for parties the fruits of their prior judgment" (*id.* at 758), declined, in the exercise of its equitable jurisdiction, to issue an injunction barring subsequent suits when none had yet been commenced. Here the settlement agreement does no more than impose upon class members, including Chamberlain, a covenant not to sue.

or Chamberlain against the Chicago and Los Angeles teams with whom they had player contracts, are specifically excluded from the covenant's reach. (JA 904)\*

It is particularly ironic -- if not rather disingenuous -- for Chamberlain's counsel to challenge the settlement agreement on the grounds that it contains a covenant not to sue. In the multi-million dollar settlement of the Gypsum class action litigation, in which cases Chamberlain's counsel represented plaintiffs\*\*, a covenant not to sue was approved by the court and agreed to by plaintiffs' counsel. See Richard's Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18 (7th Cir. 1976). Moreover, covenants by class members not to sue in class action settlement agreements have been enforced by this and other courts,\*\*\* have been cited

\* Walker has already sought to take advantage of this exception. On September 29, 1976, he demanded the processing of a grievance he has with Chicago concerning his claim that in 1976 Chicago wrongly refused to tender a new contract to him. Walker's grievance is apparently based on the assertion that his 1974 contract with Chicago, the same contract about which he complains here, obligated Chicago to tender him a new contract.

At the preliminary injunction hearing Chamberlain's counsel argued that Chamberlain's antitrust suit "may ultimately be a contract cause of action." (JA 1404) If the suit were a contract claim, rather than an antitrust action, the settlement agreement would not bar it.

\*\* In re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974); Wall Products Co. v. National Gypsum Co., 367 F. Supp. 972 (N.D. Cal. 1973).

\*\*\* Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954), cert. denied, 350 U.S. 835 (1955). See also Richard's Lumber & Supply Co. v. United States Gypsum Co. 545 F.2d 18 (7th Cir. 1976); Berman v. Thomson, 403 F. Supp. 695 (N.D. Ill. 1975).

with approval in opinions approving class action settlements\* and are frequently found in class action settlement agreements.\*\*

Equally appropriate in the settlement agreement is the provision (JA 905) that vests in the Special Master, and ultimately the District Court, the power to enforce the obligations in the settlement agreement. The final judgment provides (JA 1810) that "this Court retains exclusive jurisdiction over the action to enforce the terms of the Stipulation and Settlement Agreement."\*\*\* Such provisions for continuing jurisdiction to enforce the terms of the settlement are standard in class actions.\*\*\*\*

\* Bogges v. Hogan, 410 F. Supp. 433 (N.D. Ill. 1975); Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D. Ga. 1973); Fox v. Glickman Corp., 254 F. Supp. 1005 (S.D.N.Y. 1966); Derdiarian v. Futterman Corp., 38 F.R.D. 178 (S.D.N.Y. 1965); Cherner v. Transitron Elec. Corp., 221 F. Supp. 48 (D. Mass. 1963).

\*\* See, e.g., In re Master Key Litigation, M.D.L. Docket No. 45 (D. Conn. June 14, 1976), Record at 1036, aff'd, Slip Op., Dkt. No. 76-7376 (2d Cir. Sept. 27, 1976); City of Detroit v. Grinnell Corp., 68 Civ. 4026 (S.D.N.Y. Jan. 23, 1973), Final Judgment at 3-4, approved, 356 F. Supp. 1380 (S.D.N.Y. 1972), aff'd, 495 F.2d 448 (2d Cir. 1974); West Virginia v. Chas. Pfizer & Co., supra, 314 F. Supp. at 747.

\*\*\* The continuing jurisdiction provision here is analogous to a court's unquestioned jurisdiction to enforce, and to punish parties for violations of, the terms of a consent decree. See, e.g., United States v. Schine, 260 F.2d 552 (2d Cir. 1958), cert. denied, 358 U.S. 934 (1959); United States v. National Lead Co., 137 F. Supp. 589 (S.D.N.Y. 1956); Sunbeam Corp. v. Masters, Inc., 124 F. Supp. 155 (S.D.N.Y. 1954).

\*\*\*\* See, e.g., Shakman v. Democratic Organization of Cook County, 533 F.2d 344 (7th Cir. 1976); Zients v. LaMorte, 459 F.2d 679 (2d Cir. 1972); City of Detroit v. Grinnell Corp., 68 Civ. 4026 (S.D.N.Y. Jan. 23, 1973), Final Judgment at 3-4, approved, 356 F. Supp. 1380 (S.D.N.Y. 1972), aff'd, 495 F.2d 448 (2d Cir. 1974); EEOC v. Plumbing & Pipefitting, Local 189, 438 F.2d 408, 414 (6th Cir.), cert. denied, 404 U.S. 832 (1971) ("[v]ery properly the court expressly reserved jurisdiction to enforce its order"); Derdiarian v. Futterman Corp., supra.

Accordingly, the covenant not to sue and continuing jurisdiction provisions in the settlement agreement are proper.

D. The Injunctions Against Prosecution Of The Chamberlain And Walker Actions, Even If Reviewable Here, Were Proper

Even if, as Chamberlain contends, the judgment can be interpreted as "permanently enjoin[ing] Chamberlain from prosecuting his California action" (Supp. Br. 16), the injunction was justified on the facts before the District Court.\*

1. Chamberlain's Antitrust Claim Is Part of the Robertson Complaint

Chamberlain contends that his 1975 "antitrust claim . . . in the California action . . . is separate and distinct from claims subject to the District Court's judgment herein." (Supp. Br. 19) Not only is this contention incorrect, as shown by Chamberlain's concession below, but Chamberlain is estopped from making the argument.

Chamberlain was given an express invitation by the court below in July of 1976 "to show that his [California] claims are not so related" to the Robertson claims, and if he made such a showing "he will be entitled to pursue his litigation

---

\* While Walker does not appear to challenge the injunction halting the prosecution of his Philadelphia action which attacked the legality of the option clause (JA 806), the discussion which follows is equally applicable to Walker, a named plaintiff, who testified that he had always understood the purpose of the instant litigation was that "[w]e were questioning the legality of the . . . option situation." (p. 10, supra)

independently." (Opn. JA 1683) Chamberlain waited over six months, until February 8, 1977, before moving before Judge Carter to seek to demonstrate the separate nature of his California claim. (See pp. 19-20, supra.) Chamberlain, who recognized that it is to the District Court, not this Court, that he should have argued the unrelated nature of his California claim, is thus estopped from arguing that his California action differs from the instant case.

In any event the two actions are the same. Comparison of the Chamberlain complaint (JA 680) with the one at bar (JA 965) reveals that in both cases the parties and the markets are the same, as is the basic charge that the NBA is an unlawful monopoly that has been conspiring to restrain trade and commerce. The specific acts complained of in Chamberlain's complaint are all found in the complaint in this action. Both complaints allege to be illegal the option clause, the NBA rule prohibiting an NBA player while under contract with one team from negotiating with another team, and the compensation plan when a player becomes a "free agent".\*

Chamberlain contends, although his California complaint does not so state, that his alleged injury is different from that complained of here because his injury occurred after he "sat out the 'option year'" (Supp. Br. 19), while the instant complaint complains of injury when a player plays out the option year. In granting the NBA's motion to enjoin prosecution of Chamberlain's California

---

\* For a detailed comparison of the two complaints, see JA 666-9.

action, Judge Carter properly rejected this distinction:\*

"Minor variations in the restraints at issue do not constitute new antitrust claims that are outside of these proceedings."

(JA 1343) Judge Carter reasoned:

"Central to Chamberlain's California complaint is his assertion that after he had failed to play basketball for the Los Angeles Lakers during the 1973-74 season, he was informed that he could not contract with any other NBA team unless that team compensated Los Angeles. This procedure, involving the option clause and a practice known in this lawsuit as the reserve compensation plan, is also central to Robertson. The only difference asserted by Chamberlain is that since he sat out his option year, rather than play for Los Angeles under an extension of the terms of his previous contract, he was informed that he owed a year to Los Angeles, for which that team would have to be compensated by any club that wanted to purchase his future services. . . . [W]hat happened to Chamberlain is merely another variation on the allegedly anti-competitive practices challenged in this lawsuit." (JA 1343-4)\*\*

\* Judge Carter's conclusion that the two actions were substantially the same is clearly correct, as both cases involve essentially the same "cause of action". See Acree v. Air Line Pilots Ass'n, 390 F.2d 199 (5th Cir.), cert. denied, 393 U.S. 852 (1968); Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951); Ruskay v. Jensen, 342 F. Supp. 264 (S.D.N.Y. 1972); Restatement of Judgments §61 (1942).

\*\* Since Chamberlain, after refusing to report to Los Angeles, was declared a free agent by NBA Commissioner O'Brien before the California action was commenced and before the basketball season began (JA 724), whatever distinction there may have been between playing out and sitting out the option had disappeared. Chamberlain, like someone who had played out + option, was permitted to sign with any NBA team, subject only to the NBA compensation rule, the legality of which was central to the Robertson complaint. [footnote continued on next page]

Judge Carter's conclusion that the boycott complained of by Chamberlain was the same as the boycott complained of here was conceded by Chamberlain's counsel at the preliminary injunction hearing.

"THE COURT: . . . I don't believe the fact that new variations of a rule are enforced makes it any different. . . . The [problem] you have just alleged I really have difficulty in seeing how it is different from the basic cause of action which the NBA has before me.

MR. BOONE [Chamberlain's counsel]: With regard to that, Your Honor, I agree with you that there is not a whole lot of difference.\* I think the rule is still a boycott. . . . No matter what you call it, it's still a boycott." (JA 1405-7, emphasis added)

Chamberlain's contention that his California "claim is unequivocally separate and distinct from those in issue herein" (Supp. Br. 21) must therefore be rejected.

2. The Time of the Accrual of Chamberlain's Claim Is Irrelevant

Chamberlain also contends that because "the restraint was not fully implemented and he was not injured until

---

[footnote continued from previous page]

In fact, since the settlement agreement provides that a player must complete all his contractual obligations -- including playing for the entire contract term -- before becoming a veteran free agent subject to compensation (JA 874), Chamberlain, upon being declared a free agent subject to compensation even though he had not played out the option, was, if anything, granted a more favorable status than a player who had played out his option.

\* The word "difference" was erroneously transcribed as "difficulty".

after the class notice had been sent out and received" his claim is "unique and separate." (Supp. Br. 19) But since a "judgment precludes recovery on claims arising prior to its entry,"\* it is obvious that Chamberlain's complaint, subsumed as it is within the Robertson complaint, is barred by the Robertson judgment.\*\*

The legality and operation of the option clause, including the compensation system Chamberlain attacks, has long been part of this case. The original 1970 complaint (JA 949) alleged that the option clause in the NBA Uniform Player Contract was illegal. The same allegation is made in Chamberlain's December 1975 complaint. In a July 25, 1974 affidavit submitted by the NBA in support of its motion for summary judgment the NBA's "compensation" policy was explained (JA 193), a policy also attacked by Chamberlain's complaint. In his February 14, 1975 opinion denying the summary judgment motion, Judge Carter made extensive reference to that compensation policy (JA 354-5, 362-5) and ruled that its legality "cannot be determined except at trial." (JA 363) When notice of the class action was sent to all

\* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 328 (1955). See also Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282 (1946); Macris v. Sociedad Maritima San Nicolas, S.A., 271 F.2d 956 (2d Cir. 1959), cert. denied, 362 U.S. 935 (1960); Travelers Ins. Co. v. Commissioner, 161 F.2d. 93 (2d Cir.), cert. denied, 332 U.S. 766 (1947); Cleveland v. Higgins, 148 F.2d 722 (2d Cir.), cert. denied, 326 U.S. 722 (1945).

\*\* See Wren v. Smith, 410 F.2d 390 (5th Cir. 1969); Rivera v. Chicken Delight, Inc., 17 F.R. Serv. 2d 473 (S.D. Tex. 1973).

class members, including Chamberlain, in September 1975 (JA 555-6), the complaint was explained to include "the NBA policy or practice under which one member team in the NBA is compensated by another NBA team when a player signs a contract with that other NBA team after the player achieves 'free agent' status" (JA 538). That same notice advised each class member, including Chamberlain, of his right to be separately represented and to move for leave to intervene (JA 541), a right Chamberlain never availed himself of.

When plaintiffs moved, in October 1975 (JA 557), shortly after the actions complained of by Chamberlain occurred, to amend their complaint to make specific reference to the reserve compensation plan, the court noted that, while the motion would be granted\*, the issue was already "in the case" and "[y]ou are certainly going to be allowed to present evidence on it. It is part of the reserve clause as far as I am concerned." (JA 763) "The reserve compensation plan is in the case." (JA 777)\*\*

\* Numerous cases have recognized that a complaint alleging a conspiracy in violation of the antitrust laws properly encompasses other claims which arise out of that same conspiracy and which are later asserted by amended or supplemental pleadings. See, e.g., International Ship Supply Co. v. American Tobacco Co., 1967 CCH Trade Cas. ¶72,297 (E.D. Pa. 1967); Philco Corp. v. Radio Corp. of America, 186 F. Supp. 155 (E.D. Pa. 1960); Netter v. Ashland Paper Mills, Inc., 1957 CCH Trade Cas. ¶68,598 (S.D.N.Y. 1957); Walder v. Paramount Publix Corp., 1956 CCH Trade Cas. ¶68, 572 (S.D.N.Y. 1956); Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co., 12 F.R.D. 403 (S.D.N.Y. 1952).

\*\* The District Court's November 12, 1975 opinion granting the motion to amend the complaint also noted that "the reserve clause compensation plan is surely already in this case. . . . Evidentiary proof [on it] . . . is clearly admissible at trial even without amendment to that complaint."

In short, the legality of the NBA's "reserve" system was an issue in this case from its inception. The fact that one aspect of the system was not applied to Chamberlain until the fall of 1975 is irrelevant. To hold otherwise would mean that a class action challenging the legality of a particular practice and seeking damages therefor, could not seek relief with respect to the application of that challenged practice merely because such application of the practice occurred during the pendency, as distinct from prior to the commencement, of the action. Such a ruling would spawn duplicative litigation and thereby subvert the very purpose of a class action.

3. The District Court Had Jurisdiction  
to Enjoin Chamberlain from Prosecuting  
his California Action

Chamberlain's argument that "the injunctive effect of the judgment must be set aside" because the District Court "did not have in personam jurisdiction over Chamberlain" (Supp. Br. 16) is specious.

In respect of the jurisdiction of the court to issue orders binding on class members like Chamberlain, this class action is truly unique. Before it was brought, each named plaintiff and class member -- including Chamberlain (JA 680x) and Walker (JA 816) -- authorized in writing the filing of this action as a class action on his behalf. By virtue of that written authorization and the subsequent filing of this suit on his behalf, Chamberlain, just like any plaintiff, con-

sented to the jurisdiction of the District Court by affirmatively seeking relief therein.\*

Moreover, as a player in the NBA from 1959 to 1973 (JA 680i, 680j) Chamberlain regularly traveled to New York to play against the New York team of the NBA on a regular basis (JA 680c, JA 680e).\*\* The arbitration concerning whether the option in his 1971 contract had been properly exercised was held in New York, with Chamberlain represented by counsel. (JA 204) Since the dispute over which Chamberlain now seeks to sue is an outgrowth of his 1971 NBA contract, the New York courts have jurisdiction over him under CPLR §§301, 302, the provisions of which are, of course, applicable in federal court. Fed. R. Civ. P. 4(c); Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963).

In addition, injunctions against subsequent duplicat-

\* See Hadden v. Rumsey Products, Inc., 196 F.2d 92, 95 (2d Cir. 1952); Hoxsey v. Hoffpauir, 180 F.2d 84 (5th Cir.), cert. denied, 339 U.S. 953 (1950); Brown v. Hughes, 136 F. Supp. 55 (M.D. Pa. 1955), holding that when a person seeks affirmative relief from a court he consents to its jurisdiction. See also National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 847 (D. D.C. 1975), where in personam jurisdiction over members of a (b)(1) class, sufficient to order them to pay attorneys fees, was found because each class member, as here, "has been before the court on the merits, has benefited from the court's [interlocutory] order . . . , and has been given notice and an opportunity to participate in the instant proceeding."

\*\* In addition, as coach of the San Diego ABA team in 1973-74, Chamberlain regularly traveled to New York to coach his team against the New York ABA team. (Supp. Br. 5; JA 1473-4)

ive actions -- like those of both Chamberlain and Walker -- have been issued in cases too numerous to cite comprehensively.\* Class actions, no less than other actions, face the danger of vexatious and duplicative litigation. Thus it is well established that a class action court, like any other, can enjoin the prosecution of subsequent duplicative litigation.\*\*

As this Court wrote in Meeropol v. Nizer, 505 F.2d 232, 235 (2d Cir. 1974), "[w]here an action is brought in one federal district court and a later action embracing the same issue is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action. . . . This rule is applicable even where the parties in

\* See, e.g., Meeropol v. Nizer, 505 F.2d 232 (2d Cir. 1974); Coakley & Booth, Inc. v. Baltimore Contractors, Inc., 367 F.2d 151 (2d Cir. 1966); Telephonics Corp. & Fabrionics Corp. v. Lindly & Co., 291 F.2d 445 (2d Cir. 1961); National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43 (2d Cir. 1961); Remington Prods. Corp. v. American Aerovap, Inc., 192 F.2d 872 (2d Cir. 1951); Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F.2d 1012 (2d Cir. 1944); Ronson Art Metal Works, Inc. v. Brown & Bigelow, 105 F. Supp. 169, 173-174 (S.D.N.Y.), aff'd on opinion below, 199 F.2d 760 (2d Cir. 1952).

\*\* 3B J. Moore, Federal Practice ¶23.92 (2d ed. 1977). See also ACLU v. Laird, 463 F.2d 499 (7th Cir. 1972), cert. denied, 409 U.S. 1116 (1973); Weeks v. Bareco Oil Co., 125 F.2d 84, 94 (7th Cir. 1941) ("The avoidance of a multiplicity of suits is one of the purposes of a class action."); Avis Rent A Car System, Inc. v. General Motors Corp., 21 F.R. Serv. 2d 1093 (N.D. Ill. 1976); Fields v. Wolfson, 41 F.R.D. 329 (S.D.N.Y. 1967); Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 624 (S.D.N.Y. 1967). Cf. Environmental Defense Fund v. EPA, 485 F.2d 780 (D.C. Cir. 1973).

the two actions are not identical."\* This conceded power of the federal courts to protect the integrity of their jurisdiction is needed to enjoin the prosecution of a second duplicative lawsuit.\*\* Chamberlain's contention that because "the district

\* See also Environmental Defense Fund v. EPA, supra; Coakley & Booth, Inc. v. Baltimore Contractors, Inc., supra; Telephonics Corp. & Fabrionics Corp. v. Lindly & Co., supra; National Equip. Rental, Ltd. v. Fowler, supra; Helene Curtis Indus., Inc. v. Sales Affiliates, Inc., 247 F.2d 940 (2d Cir. 1957); Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955); MacLaren v. B-I-W Group, Inc., 329 F. Supp. 545 (S.D.N.Y. 1971).

\*\* In the usual class action context -- unlike this action in which class member Chamberlain specifically authorized in writing, prior to its commencement, that this action be initiated as a class action on his behalf -- jurisdiction over class members to enjoin prosecution of separate, duplicative actions proceeds from several distinct bases.

First, "[t]he general principles applicable to other suits should apply in determining whether other actions by or against members of the class should be enjoined." 3B J. Moore, Federal Practice, ¶23.92 at 23-1751 (2d ed. 1977). Injunctions are binding not only upon the named parties to the action, but also "upon those persons in active concert or participation with them who [like Chamberlain] receive actual notice of the order. . . ." Fed. R. Civ. P. 65(d). Numerous cases hold that injunctions against persons who are not parties to an action, but who have actual notice of the injunction, are proper. See, e.g., Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945); United States v. Hall, 472 F.2d 261 (5th Cir. 1972); Backo v. Local 281, United Bhd. of Carpenters, 438 F.2d 176 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971).

Second, class members are in privity with the representative parties so as to justify the issuance of an injunction against them. United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951). See also Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403 (4th Cir. 1945); Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D. N.H. 1971); Salvant v. Louisville & N.R.R., 83 F. Supp. 391 (W.D. Ky. 1949); Griffin v. Illinois Cent. R.R., 88 F. Supp. 552 (N.D. Ill. 1949), all cases in which courts exercised their authority to enjoin class members as well [Footnote continued on next page]

court did not have an in personam jurisdiction over Chamberlain the injunctive effect of the judgment must be set aside" (Supp. Br. 16), must therefore be rejected.\*

[Footnote continued from previous page]

as named plaintiffs in defendant class actions.

Third, even absent class members -- unlike Chamberlain who specifically authorized this action's commencement, was kept apprised of its progress, produced documents and appeared for his deposition -- have been held to be parties for a variety of different purposes. See Fed. R. Civ. P. 23(c)(3); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 549 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Local 194, Retail, Wholesale and Dep't Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976); Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), cert. denied, 419 U.S. 1070 (1974); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972); National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842 (D. D.C. 1975); Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972); Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189 (C.D. Cal. 1972); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 582 (D. Minn. 1968).

- \* Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962), relied upon by Chamberlain (Supp. Br. 13), is not to the contrary. In fact, the court there wrote that "the theory of the class action is that all members of the class are before the court in the person of their representatives; and, therefore, can justly be bound by the court's decree" (309 F.2d at 254). That court simply held that substitution would not be permitted following the death of one of the representative parties because the substituted party would not be an adequate representative of the class, an issue not present here.

CONCLUSION

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSON  
Attorneys for Defendants-Appellees  
other than Madison Square Garden  
Corporation and Madison Square  
Garden Center, Inc.

Of Counsel:

David J. Stern  
Michael A. Cardozo  
Jeffrey A. Mishkin  
Richard L. Wasserman

February 15, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK     )  
                              :    ss.:  
COUNTY OF NEW YORK    )

Vitold J. de Stronie       being duly sworn, deposes and  
states:

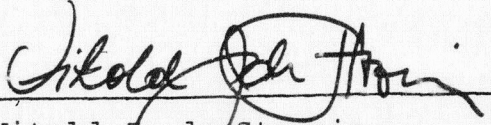
I am not a party to the action, am over 18 years  
of age and reside at Kendall Court, Norwalk, Conn.

On February 15, 1977       , I served the attached  
Brief of Defendant-Appellees NBA  
upon the following attorney(s) at the address designated  
by him (them) for that purpose:

See attached rider

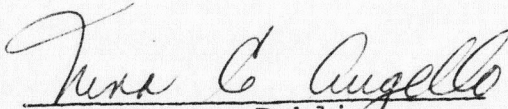
Said service was made by depositing two true copies  
of the attached

Brief of Defendant-Appellees  
enclosed in a postpaid properly addressed wrapper, in an  
official depository under the exclusive care and custody  
of the United States Post Office Department within the  
State of New York.

  
Vitold J. de Stronie

Sworn to before me this

15th day of February       , 1977

  
Notary Public

NINA C. AUGELLO  
NOTARY PUBLIC, State of New York  
No. 41-4636905  
Qualified in Queens County  
Certificate filed in New York County  
Commission Expires March 30, 1978

Boone, Schatzel, Hamrick &  
Knudsen  
235 Montgomery Street  
Suite 420  
San Francisco, Calif. 94104

Richard G. Phillips, Esq.  
1845 Walnut Street  
Suite 1975  
Philadelphia, Pennsylvania  
19103

Seymour S. Goldberg Law  
Corporation  
16633 Ventura Boulevard  
Encina, California 91436

COPY RECEIVED

PAUL WEISS, WATKINS, STORVEN & GARRISON

☒ By Hand

☐ By Mail

By pmj

Date 2/15/77 (2 copies)

2 COPIES RECEIVED

WILL, GOTSHAL & MANGES  
Attorneys for

Date: 2/15/77 @ 3:04 PM  
n.e.

COPY RECEIVED

Time 3:30 pm

Date 2/15/77

(2 copies given) ELJ

2 COPIES RECEIVED

5

WILL, GETTS & NASH

qik